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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 176.

WILLIAM A. ARTHUR & CO., PLAINTIFFS IN ERROR,

vs.

TEXAS & PACIFIC RAILWAY CO., DEFENDANTS IN ERROR.

Brief for Plaintiffs in Error.

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JAMES K. JONES, JR.,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1906.

WILLIAM A. ARTHUR & Co., Plaintiffs in Error,
vs.
TEXAS & PACIFIC RAILWAY Co., Defendants in Error.
No. 176.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This cause is brought into this honorable court by writ of error to the United States circuit court of appeals for the eighth circuit.

The suit is for $2,605.53, the value of fifty bales of cotton delivered to the Texas & Pacific Railway Company by William A. Arthur & Company, of Texarkana, Arkansas, to be transported under a bill of lading from Texarkana, Texas, to Utica, N. Y.

The defendant railway company had no depot for the reception of cotton in Texarkana, but it received its cotton on the platform of the Union Compress Company, situated on the Texas side of the State line; plaintiffs placed their cotton upon said platform and took therefor

receipts from the compress company. Plaintiffs then took these receipts to the office of the defendant railway company, situated in the State of Arkansas, and, upon giving them up to the agent of the defendant, received a duly signed bill of lading, obligating the defendant railway company to transport the cotton to Utica, N. Y., reserving the right to compress the cotton, at its own expense, at any point. After executing and delivering said bill of lading the defendant railway company directed the compress company in writing to compress and ship said cotton by the Iron Mountain Railroad, surrendering the receipts of the compress company given to plaintiffs, with this order, and receiving from the compress company receipts for the cotton to the defendant railway company. The defendant railway company also directed the compress company to insure the cotton for the protection of the railway company, which was done, and the policies were delivered to the company's agent.

Acting under the instructions of the defendant railway company to compress this cotton the compress company separated the cotton of the plaintiffs from other cotton on the platform, and removed it to a point in front of the machine used to compress cotton, preparatory to compressing same, where it was destroyed by fire.

There was a large quantity of bagging at a point in the vicinity of this cotton, where it was exposed to sparks from passing engines, in an uncovered and unprotected condition. There was no watchman on the platform and the mechanical appliances for extinguishing fires were in such condition as to be practically useless. This

bagging caught fire from a passing train, resulting in the destruction of the cotton.

There was in the bill of lading a provision exempting the defendant railway company from the ordinary liability of losses by fire in the following words:

> "That neither the Texas & Pacific Railway Co., nor any connecting carrier handling said cotton, shall be liable for damage to or destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control."

The railroad company had but one form of bill of lading. The plaintiffs had on other occasions asked for bills of lading not having this exemption and had been refused. They considered themselves compelled to accept this bill of lading, with the exemption as aforesaid.

The complaint alleged that although the defendant had no line of railway extending from Texarkana to Utica, it held itself out as common carrier to Utica; that by virtue of a partnership and traffic agreement for the division of revenues between the Texas & Pacific Railway Co., and connecting carriers between Texarkana and Utica, the said Texas & Pacific Railway Co., was authorized by all the carriers over whose lines said cotton would be shipped to give a bill of lading for said cotton; and said defendant by virtue of its arrangements with said intervening carriers held itself out to the public and to the cotton shippers as a common carrier from Texarkana to Utica, and so represented itself to be when the fifty bales of cotton were tendered to and received by it. The complaint further alleged that the provision in the bill

of lading exempting defendant from loss by fire was void, because (1) it was received by the plaintiffs under duress, (2) said provision was unreasonable, and (3) it was without consideration. The freight rates charged were the regular rates for the shipment of cotton from Texarkana to Utica, and no option was offered to plaintiffs to receive any other form of bill of lading, and plaintiffs did not assent thereto. The cotton was received by the defendant September 17, 1900, and was destroyed by fire on the platform of the Union Compress Co. in Texarkana, Texas, where said company received it on the 19th day of September, 1900.

The plaintiffs further alleged that immediately after said cotton was received by the defendant to be shipped to Utica, said defendant delivered the cotton to the Union Compress Co., as its agent, for the purpose of having it compressed for the convenience of the defendant in handling the same; that said Union Express Co.'s platform was not a safe place on which to keep cotton; that it was not inclosed, and no provision was made to prevent the destruction of said cotton by fire; that said compress company, while so acting as agent for the defendant, failed to provide suitable or proper apparatus for putting out fires, and failed to keep watch to prevent said cotton from being destroyed by fire, and on the 19th day of September, 1900, while said cotton was exposed and the employees of said compress company, the agent of the defendant, were neglecting to care for said cotton, it caught fire from sparks from a passing engine and was destroyed.

The defendant pleaded as a defense the fire exemption

clause in the bill of lading. The consideration shown by the bill of lading reads:

> "In consideration of the rate of freight herein named, it is hereby stipulated, etc."

The bill of lading also contains the following stipulation:

> "Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression."

The answer admitted that defendant was authorized and empowered to execute said bill of lading for the shipment of cotton from Texarkana, Texas, to Utica, N. Y., and did not deny that defendant had traffic arrangements with connecting carriers between Texarkana and Utica whereby a division of freight was agreed upon and the defendant was authorized by said connecting carriers to execute said bill of lading. And defendant did not deny the allegation of the complaint that by virtue of defendant's arrangements with intervening carriers, defendant held itself out to the public and to cotton shippers as a common carrier from Texarkana to Utica, and so represented itself to be when the fifty bales of cotton was tendered to and received by it; but did deny that it was a partner with said connecting carriers.

Defendant denied that said freight rates charged and stipulated for in said contract was the only rate on said

cotton from Texarkana, Texas, to Utica, N. Y., and denied that no option was given to said plaintiffs to ship cotton without exempting said defendant from liability for loss of cotton by fire, and denied that defendant acted as agent for the St. Louis, Iron Mountain & Southern Ry. Co., or any other carrier, in making the contract set up in the complaint, except to guarantee the through rate of freight.

Defendant denied that it delivered the cotton into the custody of the compress company, but alleged that the same was delivered to the said company by the plaintiffs and was tendered to the defendant on said platforms by the plaintiffs, and denied that it made said compress company its agent for the purpose of having the cotton compressed and denied the acts of negligence set up in the complaint. The sixth paragraph of the answer contains the following:

> "That said cotton was received by defendant to be shipped under said bill of lading and written contract which, among other things, specially stipulated that the liability of the Texas & Pacific Railway Co., in respect to said cotton, was limited to its own line of railway, and it shall not be liable for any loss, detriment or damage done to or sustained by said cotton not occurring on its own road, nor after said cotton has been delivered, or is ready for delivery, to the next connecting carrier or consignee."

Defendant further pleaded that at the time of the execution of said bill of lading and the loss and destruc-

tion of said cotton, it neither owned or controlled any line of railway in Arkansas; that its entire line was in Texas and that the compress at which said cotton was delivered is located a few hundred yards west of the line between Texas and Arkansas, and that defendant's line only extends to the said State line in the direction in which said cotton was to be transported; that the cotton was placed with said compress company and there tendered to the defendant, and the said bill of lading and contract was then and there executed; that under the laws of said State of Texas, where said cotton was then and there situate, and under the rules and regulations of the defendant, which were reasonable, it was then and there the duty of the defendant to give a bill of lading for such cotton when so tendered to it in the manner or on the same terms it would receive and receipt for cotton if tendered at its own platform assigned by it for such transactions, and that under said laws and said rules and regulations, when said cotton is so tendered upon the platforms of the compress company where said compress is situated on the tracks of said railroad, the shipper assumes the risk of insurance involved by said act of the railway company, and assumes the risk of said cotton being lost by any agency whatever except it be the negligence of the railroad company.

Specification of Errors.

The trial court was in error in that—

I.

Its judgment was contrary to law.

II.

Its judgment was contrary to the evidence.

III.

Its judgment was contrary to the law and the evidence.

IV.

In directing the jury upon the undisputed facts of the case, to render a verdict for the defendant.

The Circuit Court of Appeals was in error—

I.

In entering a judgment affirming the judgment of the Circuit Court of the United States for the Western District of Arkansas in favor of the defendant in error.

II.

In not reversing the said judgment of the United States Circuit Court for the Western District of Arkansas, and in not remanding said case to said circuit court for a new trial.

III.

In not sustaining the assignment of errors upon the record in said cause.

IV.

In sustaining the action of the Circuit Court of the United States for the Western District of Arkansas in directing the jury, upon the undisputed facts in the case, to render a verdict for the defendant in error.

V.

In rendering judgment against plaintiffs in error and in favor of defendant in error for the costs of suit.

Reduced to concrete propositions, the Circuit Court of Appeals for the Western District of Arkansas was in error—

I.

In not adjudging that there was a delivery of the cotton to the railway company, so complete as to entirely remove it from the supervision or control of the plaintiffs in error, and to absolve the plaintiffs in error from any liability regarding it, except that which might result from the acts of God or the public enemy.

II.

In not holding that under the regulations and practice of the railway company plaintiffs in error were compelled to accept from the railway company the bill of lading which contained the exemption against liability for the loss by fire, and had not the option to select a bill of lading which did not contain such exemption; and that because of such duress the plaintiff in error was not bound by the exemption, and the defendant in error was liable notwithstanding the exemption.

III.

In not holding that the railway company was guilty of such negligence after the delivery of the cotton to it as made it liable for its destruction by fire.

IV.

In not holding that the stipulation of exemption from liability for loss by fire, if valid, was inoperative while the cotton remained on the platforms of the compress company, by direction of the railway company, for compression, as a matter of convenience to the company.

V.

In not holding that the delivery of the cotton by the railway company to the compress company to be compressed for the sole benefit of the railway company, made the compress company the agent of the railway company, and that for the acts of said agent, negligent or otherwise, resulting in loss to the plaintiff in error, the railway company was liable.

VI.

In not holding that the regulation of the railway commission of Texas had no application to the contract between the plaintiff in error and the railway company, and furnished no immunity to the railway company against liability.

VII.

And finally, in not submitting each question of fact indicated in the foregoing specifications for the determination of the jury.

Evidence of Delivery to Railway Company.

While there seems to be no specific denial in the pleadings that the cotton sued for was actually delivered to the railway company, this delivery was in effect denied when the defendant denied that it had delivered the cotton to the compress company and denied that it made the compress company its agent for the compression of the cotton.

John C. Ware testified that W. A. Arthur & Co. delivered to the Union Compress Co. fifty bales of cotton and received compress receipt or receipts therefor; that subsequently on September 17, 1900, he took the compress receipts to the agent of the Texas & Pacific Railway Co., and surrendered them and received the bill of lading. R., 13.

The Texas & Pacific Railway Co., had no other place in Texarkana to receive cotton except at the Union Compress Co's platform. R. 15. We were not permitted to route the cotton and I did not ask that it be shipped over the Iron Mountain. R., 19.

We had nothing to do with the compression of the cotton. It was for the convenience of the railway company. The compression would be of no advantage to us. R., 20. We had no agreement at all with the compress company for compressing the cotton, and I do not know whether the compress company was in the habit of compressing all the cotton we shipped out, as we had nothing to do with it. The Texas & Pacific Railway Co. has no platforms on which to receive cotton, and the plat-

forms of the compress company is the regular and only place on which the Texas & Pacific Railway Co., received cotton for shipment. R., 21. After the cotton was shipped to the order of W. A. Arthur & Co., Utica, N. Y., "notify Utica Steam Cotton Mills," the draft for the price of the cotton was attached to bill of lading and delivered to the bank for collection, and when we ascertained that the cotton had been destroyed, we took up the draft. R., 18–22. The concentration of the cotton at the compress was a mutual advantage to ourselves and the railroad. R., 24. Our buyers were instructed to ship the cotton to the compress. It is more convenient in a general way to do so, as we can look after it and keep it thoroughly insured, and have it classified. R., 22. The advantage of concentration of the cotton at the compress was mutually beneficial to the railway company and to ourselves. R., 25.

V. E. Buron testified that he was chief clerk of the Texas & Pacific Railway Co. in the Texarkana local freight office, and signed the bill of lading for the fifty bales of cotton in controversy. All cotton to be shipped over the Texas & Pacific Railway Co. was received at the Union Compress and was usually there when we signed the bills of lading for it. That was the only place that was prepared for the reception of cotton. The plaintiffs delivered me the compress receipts for these fifty bales and I signed the bill of lading and gave the compress instructions as to loading and cancelled those compress receipts. R., 37. We send the cotton duplicates or compress receipts to the compress and they tear out the

perforated part and sign in a book. In this case the railway company got a receipt for the cotton from the compress in regular form. R., 38. The witness further testified that the form of the order given by the railway company to the compress company for compression and shipment was as follows:

I have this day issued on your compress receipt bill of lading to.....for..... bales of cotton, marked..... .....No. of bales.. ... . , weight .....*Compress and ship above cotton* by the... ..... railroad for account of.....

_____

Agent.

Record, 91.

The bill of lading in this case shows the cotton was marked C. O. T. S.; weight 25,358 pounds. R., 10.

Witness also testified that if cotton had been tendered at the local platform instead of the compress platform he did not know what they would have done, but would have had to receive it and send it to the compress. We could not very well handle it at the local merchants' platform. R., 92. That when cotton was ordered to be shipped from the compress by the railway company after issuing bills of lading, it took up the compress receipts and the railway company would direct and authorize the compression and shipment of the cotton by a certain form. R., 92.

As soon as I issued the bill of lading for the cotton we wired the general office at Dallas for instructions, and

the agent gave us the instructions. The compress company took out insurance on this cotton, which also included all cotton for which bills of lading were issued for the benefit of the Texas & Pacific Ry. Co., and the policies were delivered to Mr. Hovey, the agent of the railway. It was customary for the compress company to carry the insurance for the benefit of the railway company. I made it a business to go to the compress every ten days. I was at the compress the day this bill of lading was issued or the day after. I made it a business to check how much cotton there was at the compress and if I noticed there was not sufficient insurance I had it increased at once. R., 39.

George West, manager of the compress company, testified, corroborating the testimony of Mr. Buron, that when bills of lading were issued for cotton the compress receipts were surrendered by the shipper to the agent of the railway company and by the railway company to the compress company, and a form of instructions was signed by the railway company's agent directing the compress company to compress and ship the cotton. R., 93. In this instance, as we always do, we got a shipping list, but we got those instructions (for compression) from the railroad company. We got what we call a shipping list from the owners of the cotton, but prior to the receipt of that (the order to compress) and immediately upon receipt of the shipping list we spotted or tagged the cotton which is covered by that shipping list and moved it to its place in front of the press preparatory to being pressed and shipped as per those directions (of the railway com-

pany). That was done in this particular instance. We were going to make a run the next day. R., 93–4. In some instances the cotton was carried around to the press before we got the directions (from the railway company); but I do not know whether it occurred in this particular case. The shippers merely give us a shipping list saying which cotton they want shipped and the railroad people give the shipping-directions. The shippers gave us the ticket numbers of a certain lot of cotton which might be shipped under that mark and the railroad company then told us to ship under those directions 100 or 150 bales as the case may be, and mark it as that form there reads. This fifty bales was worked up from all points of the platforms and stacked for the purpose of compressing. R., 94.

Witness was not able to state whether or not the directions from the railway to compress and ship were given to him before the shipping list was furnished by the owners; but both occurred before the fire as the cotton was identified and carried around to the press for compression and thereby separated from the mass of cotton. It is immaterial whether the directions were given by the railway before or after the shipping list was handed to the compress company's agent. The facts are undisputed that the railway company directed the compress company to compress the fifty bales and took a receipt from the compress company for the cotton, the shipping list was furnished by the owners and the cotton was identified and carried to the press with a view of compression for account of the railway company, then the fire.

Evidence of Negligence.

The diagram of the compress platforms (R., 55) shows that there were railroads on three sides of the platforms. On the north the track of the Texas & Pacific; west, the Kansas City Southern, and on the south the St. Louis Southwestern Ry. Co. The platforms on the north were 350 to 400 feet long; west, 350 to 400, and on the south 400 to 600 feet.

The platforms are uninclosed and there is no shed over any part of it except a small shed near the compress 100 by 200 feet, and the shed is uninclosed. The fire started on the southwest corner of the platforms and must have caught from sparks of an engine passing along the Cotton Belt Railway.

Mose Wagner, one of the employees of the compress company, testified that at the time of the fire there were 1,200 or 1,300 bales of cotton on the platforms and hardly any of it under the shed. There was a covered shed at the compress and boiler room. The greater part of the cotton was not under the shed. The fire caught about half past twelve o'clock in the day time. There were five persons at the platforms and they were eating at the time the fire occurred. Mr. West, the manager, had gone home to dinner, and Mr. Statti was in the office. While we were at dinner a freight train passed on the track of the St. Louis Southwestern Railway Co., and a switch engine on the K. C. P. & S. We all remained at dinner until we noticed the fire. Some one of them made a remark that there was a fire at the far end of the

building and I ran down there and called to the boys to take out the hose and I stayed there until they got the hose stretched out, but we could not find the nozzle and the hose could not be used successfully. The nozzle was found afterwards, but not in time to be used at the fire. The fire occurred after those trains went by. The cotton on the platforms had caught several times before that. The fire caught about 40 or 50 yards from where we were sitting. Mr. Statti was the only white man present and he was in the office asleep. There was nothing kept about the platforms to throw over the cotton as a covering. Trains were passing all the time along the several railroads and I have frequently noticed sparks come from the engines. I do not think any person had been around where the fire originated for quite awhile before the fire was discovered, and I know that I did not go around there after the trains passed. The wind was blowing pretty high from the southwest (R., 45–8)

Chess Baker testified that when the bell rang for dinner, the four employees met in the center of the building at the press and began eating dinner. The nozzle was off the hose when they tried to use it on the fire and failed to use it for a few minutes. We found the nozzle in the frame of the press, on the shed. I happened to know it was there. In the morning we were washing out the boilers, and I saw it there, and I made for the nozzle. The witness indicated on the diagram the fire plugs 140 feet apart. Witness testified that the nozzle was right opposite the lower plug, and he had to go that distance to get it and carry it back to plug on the south

side before the hose could be used (R., 63). After I screwed on the nozzle it was too late to use it. I noticed trains go by when we were at dinner. One went south on the Cotton Belt right up grade. It was puffing, and there was a heavy load. I did not notice any sparks that day, but I have at day and night, too. We saw the train go by. After the train went by we kept on eating until we saw the fire. I do not know that it was anybody's business to go around looking after trains passed. I had not been so directed, and I did not notice any person going around and looking after the trains passed (R., 64).

Harry Gaither testified that the hands were all at dinner about the press, and a freight train passed on the south side. The fire broke out after twenty minutes or half an hour. The nozzle of the hose was gone. "Baker tried to find it, I think, and he did find it, and I went down where I could work on the other hose; by that time the fire was under way and we got safe." (R., 87).

Jim Murphy testified that it was 50 or 75 yards to where the fire broke out on the southwest corner of the building. He was the first to discover the fire. We had the hose stretched out, but the nozzle was not there. I noticed one train and a switch engine pass twenty or thirty minutes before the fire, and we kept on eating our dinner (R., 88).

George West testified that the shed at the platforms had corrugated iron roof, and the side extended within six or seven feet of floor, and was open all around with the exception of oplacene, about the middle of the shed,

which was closed in (R., 52). The shed did not cover more than one-fourth of the platform. There were two fire plugs on the platforms at the time, and a small three-quarter inch plug used right by the press for drinking water, and we had a hose attached to it for fire protection. Witness identified the diagram referred to as being correct. The plugs were 140 feet apart. A new press has been built, and the building and platforms are quite different from what the other was. There had been fires before which were put out. There were quite a good many for a year after I first came down here.

I think that this particular location is a little more dangerous than a good many other compresses on account of the proximity of the railroads there.

Q. What was necessary, if anything, to make it a reasonably safe place? A. There were lots of things. The shed could have been enlarged and more hydrants could have been placed.

Q. What about the enclosure of the shed? A. The enclosure of the shed as it stood then?

Q. Yes, sir. A. I don't think it could have added a bit to it.

Q. Why? A. Because there was cotton on the open platforms at all times that would be much nearer exposure from fires from the engines than that cotton could possibly have been under the shed, and at all times the cotton would have been exposed to railroads.

Q. In other words, could you not remodel that shed so as to help the situation? A. I don't think it would.

Q. It would have been necessary to have a larger shed? A. Yes, sir (R., 50–4).

Owing to the location of the railroads this compress was more hazardous than the usual run of compresses, as they are not usually situated as near the main lines as this one.

The compress at Little Rock was protected better in every way. It was not as near to any main line of railroad, and not as near to as many lines. The Union Compress Company's building at Little Rock had a brick fire wall on the platforms close to one of the main railroads which passed there, and it was not over 20 feet wide. The Union Compress Company's building here on the K. C. S. side I think must have been 60 feet of open platform between the shed and the side track, and on the Cotton Belt on the south it was 60 or 75 feet, and on the Texas & Pacific it averaged from 60 to 100 feet. None of these platforms, ranging all around from 60 to 100 feet, were inclosed, nor covered by shed. Witness did not know anything about the compresses at Shreveport or Ft. Smith (R., 60–1). The compresses at Hope and Newport were better protected. The exposures of the Union Compress Company's sheds here were greater than at Hope or Newport (R., 61).

Evidence of Duress.

In the pleadings it is not denied that the Texas & Pacific Ry. Co. held itself out as a common carrier of cotton from Texarkana to Utica, but the answer denied that the rate of freight charged was the only rate that would have been quoted to plaintiffs if they had demanded a common law form of bill of lading, and de-

nies that no option was given to defendant to receive a different form of bill of lading than that executed.

H. L. Redfield testified on behalf of the railway company that the defendant would have issued a bill of lading to Utica, N. Y., without any limitation whatever, that the company would have undertaken to transport the cotton as an insurer (R., 80). This strongly sustains plaintiffs' contention that defendant held itself out to the public as a common carrier from Texarkana to Utica, although it did not have a line of railway to that point. The proof on the part of the plaintiffs shows that if the railway company had a rate of freight for which they would have issued a through bill of lading without limitation, no one was authorized to quote it except the general officers of the company at Dallas (R., 81).

C. P. Hovey, agent of the railway company, testified that the Texas & Pacific Railway Co. issued only three forms of bills of lading for the shipment of cotton The inter-state cotton bill of lading (R., 10); the domestic cotton bill of lading (R., 33), and the export cotton bill of lading (R., 35). The first named was for the shipment of cotton out of the State of Texas; the domestic was for the shipment of cotton between points in Texas, and the third was for foreign shipments, all of which had substantially the same clauses exempting the company from loss of cotton by fire as well as the other limitations in the bill of lading. Mr. Hovey testified that these forms of bills of lading for the shipment of cotton were the only form that he was authorized to deliver to shippers (R., 30). He further testified that he was not au-

thorized to quote any different rate of freight to shippers of cotton than that furnished to plaintiffs, nor was he authorized to strike any of the conditions out of the bills of lading (R., 29).

John C. Ware testified that he had been shipping cotton for several years and that he knew the regular rate of freight over the railroads; including thedefendan t's rate, from Texarkana to Utica, N. Y., and that the only rate was 85 cents per hundred, the rate which plaintiffs paid in this case. He testified further that he knew the form of bill of lading under which this shipment was made, being an inter-state shipment, was the only form which the defendant would execute, and 85 cents, was the regular published rate, and further that he knew that it was useless to request the agent of the company to furnish him a different form on a different rate, as at different times he had asked that certain small clauses should be eliminated from the bills of lading and had asked the privilege of routing the cotton, which were refused, and he knew that such a request would be useless (R., 9-16).

The tariff book was introduced in evidence which was furnished to the plaintiffs by the agent of the Texas & Pacific Ry. Co., dated August 31, 1900, issued by the Southwestern Freight Committee, the first sheet of which shows that it was the Southwestern Freight Committee Arbitraries, of St. Louis, Iron Mountain & Southern Ry. Co., and nine other railroads with the Texas & Pacific Railway Co., and forty-two other railway companies dated at St. Louis, August 31, 1900, effective September

6, 1900, applicable on cotton shipped from East St. Louis, Ill., to Utica, N. Y., and among the signatures is E. L. Sargent, general freight agent of the Texas & Pacific Ry. Co. On page three is given the rate of 25 cents per hundred pounds from East St. Louis, Ill., to Utica, N. Y., on through bills of lading (R., 101). Ware testified that the rate from Texarkana to St. Louis was 60 cents per hundred, which added to the freight from East St. Louis made 85 cents per hundred pounds (R., 15). Witness further testified, after he heard the testimony of Mr. Redfield, the assistant general freight agent at the Dallas office, in regard to there being another rate for the shipments of cotton to Utica than that which he had paid, that he had never heard of it; he had handled the tariffs here for eight or ten years and had every season requested all the roads at Texarkana to furnish him their tariffs and that the only rate that had been furnished him from Texarkana to Utica was the 85 cent rate.

W. A. Arthur, one of the plaintiffs, testified that he had been shipping cotton over the Texas & Pacific Ry. Co. about twelve years, and knew that the company always had the fire clause in its bills of lading, and that in several instances prior to the issuance of this bill of lading he had tried to erase the fire clause from the bills of lading, but the agents of the company refused to let him do so. This attempt was made with the agents of the defendant at Franklin and Paris, Texas, and at Texarkana. When the railroad company put a clause in the bill of lading and insisted on it, we had to take

it. We made protest against the form, but not to this particular bill of lading, and finally we got so that we accepted the form under protest (R., 26–9).

V. E. Buron, chief clerk of the defendant's freight office, testified that he was familiar with the freight rates of the Texas & Pacific Ry. Co., and that the charges of freight in the bill of lading in question was the regular published freight rate for the shipment of cotton to Utica, which was filed there for public inspection (R., 39). His general instructions were to sign bill of lading to Utica, N. Y., and witness did not question the fact that the company held itself out as being able to ship the cotton to Utica. I simply had instructions from the railroad company that they had the published rate to Utica. Of course, that was sufficient authority for us to sign the bill of lading. I understood that there were tariff arrangements between the connecting carriers (R., 40). I had no authority to sign the bill of lading with any of the clauses eliminated.

Witness testified that he would have had no authority to execute a bill of lading other than that issued without instructions from the Dallas office, and that he had no such instructions (R., 40).

On cross-examination, the witness testified that it was his understanding that there was another rate, but in one part of his testimony he thought it was a higher rate and in another he did not know whether it was or not. He could not state without examining the tariffs (R., 40).

On redirect-examination, he referred to the tariff book

testified to by Ware and Arthur showing the rate of freight from East St. Louis to Utica, and identified the same as the book furnished to shippers for information as to rates.

> Q. Then they had no other tariff rates for cotton except these? (referring to tariff rate pamphlet). A. I think this tariff they have mentioned here has a cotton rate in it that was much higher than the other; but they used always the lowest rate.
>
> Q. Is this the only form of a bill of lading you were authorized to issue. A. That is the—that on interstate shipments.

He further testified that if a shipper had demanded that his cotton be shipped without limitation as to the fire clause he would have wired to the Dallas office for instructions. He had no authority to do anything without given instructions from headquarters (R., 45).

H. L. Redfield, assistant general freight agent of the defendant, testified that defendant had a rate on the shipment of cotton to Utica, N. Y., of $1.37 per hundred pounds; that the 85 cent rate applied to cotton shipped under bills of lading; that the railway company had what was called a class rate and a commodity rate on cotton. The special or commodity rate for cotton shipments has certain requirements as to bills of lading and the class has no requirements of that kind. Witness explained that the commodity rate was 85 cents while the class rate would be $1.37 (R.; 78–9). Witness testified, however (R., 80) that he did not know whether the defendant would have made a notation about goods being

received at carrier's risk where shipment was made on the $1.37 rate and that the company had no form of bill of lading to apply to that rate of shipments and had no other form of bill of lading than that furnished to the agent (R., 85).

> "Agent would not have been given instructions to alter the bill of lading from the commodity rate for the shipment of cotton" (R., 81).

> Q. You have no other form of bill of lading for this class of shipments of cotton you refer to? (meaning under the higher rate). A. We have no form for the reason that it has never been asked (R., 85).

Mr. Redfield testified that the rate of frieght under bills of lading for cotton to St. Louis was 60 cents, from St. Louis to Utica 25 cents, and that the advantage to the Texas & Pacific Ry. Co., in securing the cotton as the initial carrier was $1.50 per bale after all the expenses were paid, although defendant did not transport the cotton any part of the way (R., 84).

F. W. Offenhauser testified that he was an insurance agent in Texarkana at and before the time the cotton was destroyed by fire and that the Union Compress Co., had taken out insurance for the benefit of the Texas & Pacific Ry. Co., against loss by fire on the cotton on the company's platforms. The insurance covered "cotton in bales for which bills of lading have been issued by their duly authorized agents and for which they shall be legally liable for loss or damage by fire while contained on the compress company's platforms and in cars

on switches adjacent thereto situate in Texarkana Texas." These policies were delivered to the Texas & Pacific Ry. Co. (R., 66).

Rules of Texas Railroad Commission.

Mr. Glass, the attorney for the defendant, testified that the State Railroad Commission of Texas adopted the following rule in reference to receipt of cotton by railroads in Texas located on cotton compress platforms:

> "*Thirteenth.*—When cotton is tendered to railroad companies upon compress platform, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company" (R., 90).

Defendant also read Rule 11 adopted by the defendant, Texas & Pacific Ry. Co., the language of which is substantially the same as the above rule of the Railroad Commission of texas.

The plaintiffs are cotton buyers and are residents and citizens of Texarkana, Arkansas. They placed their cotton with the Union Compress Co., located in Texarkana, Texas.

Mr. Ware, one of the plaintiffs, testified that he had

no knowledge of the above rules governing the reception and forwarding of cotton (R , 100).

The foregoing statement of evidence introduced at the trial of this cause contains substantially all the testimony upon which the plaintiffs base their suit. Reference is now made to the record itself for a fuller statement.

When the evidence was closed, the court, on motion of the defendant, instructed the jury that upon the undisputed facts in the cause the plaintiffs were not entitled to recover and directed the jury to return a verdict for the defendant, and a verdict was accordingly rendered to which instruction of the court the defendant at the time excepted (R., 103).

The plaintiffs asked and were given ninety days time in which to file their bill of exceptions and said bill of exceptions was duly prepared embodying all the foregoing proceedings at the trial and all the evidence introduced on the part of both parties, including said instruction and was signed by the judge and made a part of the record within the time given (R., 103).

The plaintiffs filed their petition for writ of error, which was granted; also filed their assignment of errors, supersedeas bond, and such proceedings were taken that this cause was regularly before the Honorable Circuit Court of Appeals for the Eighth Circuit, with a view of reversing the judgment of the lower court (R., 104–7).

The error assigned was that the court directed the jury to return a verdict for the defendant (R., 103, 105).

This cause came on to be heard, and on the 16th day of May, 1905, an opinion of the said Circuit Court of Ap-

peals was filed, in which the judgment of the Circuit Court was affirmed with costs.

Plaintiffs filed their petition for writ of error to this Honorable Court, which was granted; also filed their assignment of errors, supersedeas bond, and such proceedings were had that this cause is regularly brought before this court with a view of reversing the judgment of the courts below.

Summary.

The plaintiffs in error contend for the following propositions in this case.

First. That there was a delivery of the cotton to the defendant and an acceptance of the same.

Second. That after the receipts of the compress company which had been given to plaintiffs had been delivered up to the defendant railway company and accepted by it and a bill of lading duly issued, and the original receipts given up to the compress company by the railway company and receipts taken to itself, and the compress company directed by the railway company to have the cotton insured for the protection of the railway company, and the policies were taken out accordingly and delivered to the agent of the railway company, and the cotton was held by the compress company under the direct orders of the railway company for compression solely for the convenience of the railway company, the compress company thereby became the employee or agent of the railway company, and the said defendant was responsible for the loss of cotton resulting from the negligence of the said agent or employee.

Third. The railway company cannot excuse itself for the loss of the cotton by negligence, on the theory that the compress company was an independent contractor, since the plaintiff's contract was with the railway company alone and there was no contract whatever between the compress company and plaintiff, and the defendant could not avoid its responsibility to the plaintiff by a contract with the compress company to which the plaintiffs were not in any sense a party.

Fourth. The stipulation as to loss by fire was void on account of duress.

Fifth. The stipulation, if valid, was inoperative while the cotton remained on the compress platforms by the direction of the railway company for compression as a matter of convenience to that company. The contract as to carriage being thereby temporarily suspended.

Sixth. The rules of Texas Railway Commission do not effect the merits of this case.

ARGUMENT.

The cotton had been delivered and accepted, and the liability of the defendant as a common carrier existed at the time of the fire.

It has been proven that the defendant had no depot for the reception of cotton for shipment except at the platforms of the Union Compress Company The plaintiffs, as was the custom, surrendered their compress receipts to the agent of the railway company on the 17th day of September and took the bill of lading, and on

that day the agent of the railway company telegraphed for instructions to the Dallas office to route the cotton, directed the compress company to insure the cotton for protection of the railway company against loss by fire, which was done and the policies delivered to the company's agent. The company's agent inspected the platform and took a receipt for the cotton from the agent of the compress company after surrendering to him the compress receipts given to plaintiff, and gave the orders in writing for compression and shipment. Subsequently the employees of the compress company selected the cotton from other cotton on the platform and carried it to the press for compression. Afterwards on the 19th day of September it was destroyed by fire. There is no suggestion in the pleadings or in the evidence that the cotton was delivered by plaintiffs on the platforms of the compress company for compression. No order was at any time made by them for the compression of the cotton. This was a matter in which they had not the slightest interest, but it clearly appears that the cotton was placed by them on this platform and receipts taken therefor because this was the only place in Texarkana where the defendant received cotton for shipment.

The shippers had nothing further to do with the shipment after delivery of receipts to defendant and taking the bill of lading. It was the duty of the compress company under its contract with the defendant to load on the cars after compression. The liability of the defendant as a common carrier had attached before the fire, unless it was necessary that the cotton be placed on board the cars to constitute a delivery.

Upon the delivery and acceptance of goods the carrier's liability is the same as when the goods are in transit.

The delivery of goods for shipment to an agent of the carrier duly authorized to receive them, or who is clothed with apparent authority and has been accustomed to receive goods for carriage, is sufficient to bind the carrier. Goods must be tendered at a time and place where the carrier is accustomed to receive freight. A deposit of the goods may amount to a delivery when there is proof of a constant and habitual practice and usage on the part of the carrier to receive goods for transportation when they are deposited for it in a certain place; proof of such practice is sufficient to show a public offer by the carrier to receive in that way, and to constitute an agreement between it and the shipper by which goods when so deposited will be considered having been delivered to it without further formality.

Am. & Eng. Ency. Law, 2d Ed., Vol. 5, page 181–4.
Fratt *v.* Grand Trunk Ry. Co., 95 U. S., 336.

The duty of loading freight of any kind upon cars, rests primarily upon the carrier. It is not necessary to constitute a delivery to a carrier that the goods be loaded upon the cars.

Am. & Eng. Ency. Law, 2d Ed., Vol. 5, page 189.
Bulkley *v.* Naunkeag Steam Cotton Co., 24 How. (U. S.), 386.
Fitchburg, etc., R. Co. *v.* Hanna, 6 Gray (Mass) 541; 66 Am. Dec., 427.

In the case of Mo. Pac. Ry. Co. against McFadden, 154 U. S., 155, the defense of the railway was that the cotton for which the bills of lading were issued was never delivered to the carrier; that by custom or course of dealing between the carrier and McFadden, it was understood by both parties that the cotton was not to be delivered at the time the bills of laden were issued, but was then in the hands of the compress company. The compress company was the agent of the shipper, and that it was the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed.

On exception to the foregoing answer, the court said:

> "All allegations in the answer were of course admitted by the exception, and, therefore, the case presents the simple question of whether the carrier is liable for a bill of lading of property which at the time of the issuance of the bill of lading remained in the hands of the shipper for the purpose of being compressed for the shipper's account and whether it was destroyed by fire before the delivery to the carrier has been consummated. The elementary rule is that the liability of the common carrier depends upon the delivery to it of the goods which it is to carry. This rule is stated in the text-books: The liability of the carrier begins when the goods are delivered to him or to his servants authorized to receive them.
>
> "The duties and obligations of common carriers with respect to goods commence with their delivery to them and this delivery must be complete so as to

> put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the common carrier by delivery and acceptance, he can not be held responsible for them."

This decision turns upon the fact that although the bills of lading had been issued, the cotton still remained with the compress company for the account of the shipper.

In the case at bar the cotton remained with the compress company by order of the railway company, for compression on account of the railway company.

The case of St. Louis, Iron Mountain & Southern Railway Co. *v.* Commercial Insurance Co., 139 U. S., 223, was also strongly relied upon by the defendant in the court below.

That was a suit for the recovery of the value of cotton lost by fire. The owner had no contract with the railway company, but he had deposited his cotton with the compress company at Little Rock, where it was destroyed

> "The defendant railway company had made an an oral agreement with the compress company to receive and transport all cotton in bales brought by its owners to the shed of the compress company, and broke this agreement by neglecting to furnish transportation for most of the cotton delivered by its owners to the compress company and for which the railway had issued bills of lading, but it had issued none for the 340 bales involved in the suit. By

reason of the neglect of the railway company to furnish transportation and the consequent accumulation of cotton in the sheds of the compress company, a large number of bales (including the 340 bales, the subject of this suit) were piled and kept by the company in public streets adjacent to its sheds, and while there was destroyed by fire from an unknown cause. So far as concerned the 340 bales the only contract of the railway company was with the compress company that it was to receive and transport the cotton. The negligence of the railway company to furnish sufficient transportation may have been a breach of that contract, for which the compress company might maintain an action, but it created no liability in contract or in tort to the owner or insurers of the cotton or to any other person. This cotton certainly was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier or even a warehouseman with regard to it; *had given no bill of lading for it; had no custody or control of it, and no possession of it, either actual or constructive,* and had no hand in placing or *keeping* it where it was. The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority that neglect was not

> the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers."

The court, in considering what effect the issuance of the bill of lading by the railway company for cotton forming part of the same mass accumulated in the streets had upon the railway company's liability, said:

> "The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties and with no intention of making any change in the actual or legal custody of the cotton until it was so loaded."

In the case at bar the defendant sought to be brought in line with the above decision by making the allegation that the bill of lading was issued to W. A. Arthur & Co., for their accommodation, but this allegation is not sustained by evidence. The bill of lading shows that the railway company reserved the right to compress the cotton, and the compression might have been done by the railway company at this compress or any other that it might have selected. Defendant might have compressed it at its own compress if it owned one. This was a privilege given to the defendant and there is no evidence that it was the purpose of the parties to the contract that whatever compress might be selected by the railway company should become the agent of W. A. Arthur & Co., instead of agent of the defendant.

Now the above decision of Railway Co. *vs.* Commercial Ins. Co., turned upon the point that the failure of the

railway company to furnish transportation was not the proximate cause of the loss of the 340 bales of cotton for which no bill of lading had been issued. No one claimed that the railway company was in possession of the 340 bales of cotton. The only claim made was that because the railway company had issued bills of lading for a lot of cotton piled in a street, which was destroyed by the same fire that spread to and consumed the cotton belonging to the plaintiff, the railway should be held responsible on the theory that the failure of the railway company to promptly remove the cotton for which it had issued bills of lading was the direct cause of the fire.

In the case of Martin *vs.* Railway Co., 55 Ark. 510, it appears that the plaintiff lost a building and 1,600 bales of cotton by spreading of the fire which destroyed the Union Compress, at Little Rock. Plaintiff's building and cotton were near the mass of cotton in the possession of the compress company, for a part of which the railway company had issued bills of lading, but it had issued no bills of lading to the plaintiff for any part of his cotton. The Arkansas Supreme Court held that the mere failure of the railway company to perform its contract with the compress company by a prompt removal of the cotton for which it had given bills of lading was in no wise the juridicial cause of the fire. There was no direct connection between the negligence of the defendant to furnish transportation according to its contract and the fire. The failure to furnish cars was one of a series of incidental events without which, as the result proved, the fire probably would not have happened, for

if the cotton had been removed there might have been no fire. But it was not the direct and proximate cause and did not make the defendant responsible for losses caused by fire.

There is no similarity in those cases to the case at bar either in the facts or in the relation of the plaintiffs to the railway company. In those cases the plaintiffs had no contract or bill of lading from the railway company, while in this case Arthur & Co., had the bill of lading for the shipment of their cotton and was under no contract with the compress company.

The Union Compress Co., of Little Rock (which also owned the compress at Texarkana in which plaintiff's cotton was lost) was destroyed by fire on the 14th of November, 1887, out of which arose the cases mentioned of St. L., I. M. & S. Ry. Co. *v.* Commercial Insurance Co., and Martin *v.* Railway Co.

A case more interesting because applicable to the case at bar is that of Cal. Ins. Co. *v.* Union Compress Co., 133 U. S., 387, which also arose out of the fire above mentioned. The facts in that case show that the Missouri Pacific Ry. Co., and the Memphis & Little Rock Ry. Co., issued bills of lading containing the fire exemption clause to different owners for their cotton stored with the Union Compress Co., and that the compress company insured the cotton for the benefit of said railway companies, and the railway companies gave orders for the compression of the cotton and at the time the fire occurred which destroyed the cotton there was an accumulation of cotton at the sheds of the compress owing to the

fact that the Missouri Pacific Railway Co., had failed to furnish cars to transport the cotton to Argenta for compression as fast as it was received; that the cotton sheds were open sheds full of cotton, which had no tarpaulin or other covering over it and stood within a few feet of the track of the Missouri Pacific Ry. Co., over which locomotives and trains passed several times a day; that after the sheds were full, the cotton was stored in the street leaving a passageway some four feet wide for foot passeng rs; that the two railroad companies had no control over the cotton while so stored and could not obtain actual possession of it until the Missouri Pacific Ry. Co., transported it to Argenta for compression, but that company could take it any time across the river for compression. It does not appear that the fire caught from sparks of locomotives and the act of negligence of the railroad is that the cotton was uncovered and not protected against fires.

The compress company brought suit against the insurance company for the benefit of the railway companies, and showed that since the loss by fire the St. L., I. M. & S. R'y Co., had been sued in the United States Circuit Court for the Eastern District of Arkansas by York Mfg. Co. and Hazard & Chapman, and said railway company defended the action on the ground that said loss was not occasioned by the railway company or its servants and employees, and on the trial of the first-named case it was adjudged by the court that the York Mfg. Co. recover from said railway company the value of the cotton sued for, and the railway company had paid said judgment,

and that several suits were then pending against the Little Rock & Memphis R'y Co., brought by consignees for portions of said cotton for the loss thereof by reason of the negligence of said railroad company.

Plaintiff recovered, and the Supreme Court of the United States, on appeal, affirmed the judgment of the lower court against the insurance company. In the bills of lading issued by the railway company, a clause exempting the company from loss by fire appeared, but there was a finding that the railway companies were liable to the holders of the bills of lading, because of the negligent failure of the railway companies or their agent, the compress company, which had actual possession of the cotton, to take care of and guard the cotton against loss by fire. There seems to have been no direct act on the part of the railway company contributing toward the loss of the cotton. The railway company had merely issued bills of lading, and one of them had agreed to transport the cotton to Argenta to be compressed. There was a breach of contract between one of the railway companies and the compress company to remove the cotton fast enough to prevent too great accumulation, but neither of the railway companies nor its employees was negligent further than to allow the cotton to remain where it was in the custody of the compress company without any covering and without being properly guarded.

The railroad company was not itself in physical possession, but the compress company in that case, as in this, was the agent of the railway company and held for it. There seems to have been no denial by the railroad com-

pany in that case that there had been a complete delivery to the railroad company when it accepted the receipts for the cotton, issued bills of laden therefor, accepted the insurance and issued orders for its compression. But if there had been the language of the Court on this point is too clear and emphatic to be misunderstood.

The Court on page 410 said:

> "The original depositors of the cotton surrendered to the railroad companies the receipts which they had taken from the plaintiff, and those companies were thus substituted in the relation to the plaintiff which before had been held by such depositors."

These facts are practically identical with the case at bar, and the decision sustains the propositions contended for by plaintiffs in error that there was a delivery of the cotton, the liability of the carrier had attached at the time of the fire, and the railway company was liable for the negligence of the compress company.

Negligence.

The courts uniformly hold that a limitation against liability is not operative where the loss occurred by reason of negligence.

Railroad Co. v. Lockwood, 17 Wallace, 383.

Bank of Ky. v. Adams Express Co., 93 U. S., 174.

Inman v. Railway Co., 129 U. S., 128.

There is evidence showing two distinct grounds of negligence causing the loss of plaintiff's cotton, both of which are chargeable to the defendant.

1. The defendant was negligent in detaining and storing the cotton with the compress company on its platforms, a place known to the defendants to be unsafe, the cotton was kept unprotected against fire.

2. The compress company was the agent of the defendant, charged with the protection of the cotton, for whose negligence the defendant was liable, and it negligently left the cotton exposed, and failed to take the ordinary precautions to guard or watch it, and did not use the means in its power to prevent its loss. The compress company provided no protection against fire, and defendant knowing this, is liable for the loss of plaintiff's cotton.

The Union Compress Company's platforms were the only place provided by the defendant to receive cotton for shipment, and it is shown that the platforms were not a safe place on which to store cotton. They were open and unprotected, while there were railroads on three sides where engines were constantly passing which had set the premises on fire frequently before. There were no adequate means provided for fighting fire, only two fire plugs having been placed there, and these were on the west side, 140 feet apart, except a small hydrant near the press for drinking purposes. There was no covering at all provided for the cotton, and none for the platforms except a small shed near the center, covering about one-fourth of the platforms, and it was not enclosed. The number of bales on the platforms at the time of the fire was about 1,300, and there was no watchman.

Mr. Buron, the agent of the railway company, who was

attending to the cotton business for the railway company, stated that he made frequent trips down to the platforms, and he must have known the conditions that existed. It cannot be contended, I think, that the plaintiffs ought not to have placed their cotton on the platform. There seems to be no reason why plaintiffs might not take the risk themselves of the loss of their own cotton while they kept it on the platform for concentration and classification. It was a matter of their own concern. But did not that risk shift to the railway company when it accepted the cotton at that point and insured it? The plaintiffs kept the cotton insured while in their possession and if the railway company had not expected to be chargeable with the risk, it ought not to have received it at the place. If the plaintiffs had concentrated and classified their cotton at another point they would have been compelled to take it to the platforms where the railway company received cotton for shipment in order to have it shipped. The fact that plaintiffs had placed their cotton upon the platforms and kept it there until they got ready to ship is immaterial, because the railway company would have required it to be carried there anyway before they would have issued bills of lading.

In the case of Judd *v.* New York & T. S. S. Co., 117 Fed. Rep., 206, it appears that a steamship company received from a connecting carrier a consignment of wool, which it placed in its shed adjoining the dock to await shipment, and while there the shed and its contents were destroyed by fire, which originated in an adjoining shed owned by others. Both sheds were wood and very dry,

and the one in which the fire originated contained a large quantity of jute, which was very inflamable, and particularly exposed to danger from fire. In an action by the owner to recover the value of the wool, there was evidence tending to show that the company had knowledge of the condition of the adjoining shed, and that it had no watchman, and little, if any, fire protection; also that while defendant employed a watchman its shed was not as well constructed to withstand a fire from the outside as others along the docks, and that there were no fire hydrants within easy reach, as there were in the case of other sheds. Held, that upon such evidence the question whether defendant exercised due care for the protection of plaintiff's goods, was one upon which reasonable men might fairly differ, and which it was the province of the jury to determine.

The fact that a carrier which placed goods received for shipment in its warehouse took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law for the destruction of the goods from a fire originating on adjoining premises which it did not own nor control, although such fire was so violent that it was impossible to prevent it from spreading to its own building, where it had full knowledge of the manifest danger to its own premises arising from the specially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances, it may have been culpable negligence, and a breach of duty as a bailee for hire, to place the goods in such warehouse.

In the case of Railway *v.* Dodd, 59 Ark., 317, it appears that the goods destroyed by fire had reached their destination and were stored by the railway company and that its liability was that of a warehouseman. The Court, in deciding whether it used ordinary care and diligence in the preservation of the property, said:

> "What constitutes such care and diligence is a question which depends for its answer upon the peculiar circumstances of each case, such as the nature and value of the property; its exposure to damage and loss; its proximity to danger from fire; the means employed to prevent or arrest the progress of the fire; the location, character and construction of the storehouse in which it was placed."

The Court further held that there was evidence of negligence from the fact that the cotton was a highly inflamable material at a time when the weather was very dry and was near a railway company's track on which trains were passing daily.

In the case at bar it appeared from the evidence that there was no watch kept of the cotton; that trains were constantly passing on three sides of the platform on which was located about 1,300 bales of cotton unprotected by shed or any covering, and that there was not sufficient apparatus provided for fighting fire.

In case of Railway *v.* Fire Association, 55 Ark., 177, the Court, in passing upon the question as to whether a shipper was guilty of contributory negligence in placing cotton upon a platform where it was liable to be destroyed by fire at which the railway company received shipments of cotton, said:

"The fact that the cotton in question was placed on a platform where it was exposed to danger did not cause the owner to forfeit the protection of the law. The cotton was placed on a platform constructed near the track of the railroad for the purpose of receiving freight for shipment and where the railroad company had been receiving cotton. The owner had the right to place it there, and in doing so did not lose its right to compensation for its destruction or damage occasioned by the negligence of the appellant."

There are many authorities cited in sustaining this opinion. The court further said:

"The rule releasing the defendant from liability on account of the contributory negligence of the plaintiff is limited to cases where the negligent act or omission of the plaintiff contributes to produce the loss as a proximate cause, and not as a remote cause or mere condition. In order to avail the defendant anything there must be, not only negligence on the part of the plaintiff, but contributory negligence, a real proximate casual connection between the plaintiff's negligent act and the injury, or it is no defense to the action. There can be no reason in relieving the defendant from liability for the loss on account of the negligence of plaintiff, if the negligent act of the plaintiff in nowise directly contributed to produce the injury. 'I may negligently leave my goods in a warehouse,' says Mr. Wharton, 'but this is not the juridical cause of their destruction if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another who sets fire to the warehouse.

> In other words, my remote negligence will not protect a person who, by proximate negligence, does me an injury.'"

On the question of negligence which should be submitted to a jury, the Supreme Court of the United States sustained the following instruction of Judge Henry C. Caldwell in case of Cal. Ins. Co. *v.* Union Compress Co., 133 U. S., 387:

> "Now, you have heard the testimony, gentlemen, with reference to the situation under which this cotton was placed and the length of time it remained there. If you think there is no negligence on the part of the railroad company, then you will find that the railroad company is not liable for this cotton. If you can say that that was a proper place to store cotton, and that leaving a passageway there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat house and skiff ferry, and it being a dry season, with three or four thousand bales of cotton stored there—then, if you say this is not negligence, you excuse this railroad company, and to that extent will disallow the claim of the plaintiff; but if you should so find I would be very much surprised at your verdict, and would not be surprised if I should set it aside; but I will leave it for you to say."

In the case of Marine Ins. Co. *v.* S. L., I. M. & S. Ry., 41 Fed. Rep., 643, which also grew out of the destruction of the Union Compress at Little Rock, Ark., and all cotton stored therein and adjacent thereto, it was shown that the railway company made the cotton sheds one of

its stations for receiving cotton for shipment, and it was claimed by the railway company that if it was negligence on the part of the railway company to receive and store cotton at that place that the owners of the cotton were guilty of contributory negligence. Judge Caldwell, in a vigorous opinion, said :

> "The plea of contributory negligence is not sustained. The delivery of the cotton at the sheds by the insured was in no sense the proximate cause of the loss, and no act of negligence on the part of the plaintiff that is not a proximate cause of the injury complained of can be considered in the light of contributory negligence, such as will bar a right of action. Beach, Contrib. Neg., Par. 10. Moreover, the defendant gave bills of lading for all cotton that was offered to it for shipment, down to the very day of the fire ; and it cannot now be heard to say that it was the fault of any one to trust it to perform its duty, because it had shown itself to be untrustworthy in the past. Immunity from liability is not to be secured by a train of misconduct, however long continued.
>
> "A few cases illustrative of this principle may be mentioned. A tenant rented certain lands for 1877, knowing that a railroad company maintained a nuisance thereon in the shape of a pond of water, which affected the health of his family. With this knowledge he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops ; and he brought an action against the railroad company ; and it was held that tenant could presume that the latter would abate the nuisance ; that the law did not re-

quire him to remove, but did require the company to abate the nuisance. Railroad Co. *v.* English, 73 Ga., 366. The law will not hold it imprudent in a person to act upon the presumption that another will act in accordance with the rights and duties of both, even though he may have formerly conducted himself in a contrary manner. Newson *v.* Railroad, Co., 29 N. Y., 383. The subject is discussed in Kellogg *v.* Railroad Co., 26 Wis., 223; Fraler *v.* Water Co., 12 Cal, 555; Bowas *v.* Towline, 2 Sawy., 27. See, also, Beach, Contrib. Neg., Pars. 10, 13, 18, 23; Damour *v.* Lyons City, 44 Iowa, 276. Moreover, if it were held to be negligence on the part of the insured and other to deposit their cotton in the sheds, knowing that the defendant had failed to remove other cotton promptly, as its duty required, still if the defendant, its officers and agents, knew of the negligence of the persons thus depositing their cotton, as the evidence shows that they did, it was their duty to avert the consequence of their negligent acts, and the defendant could not evade responsibility for a failure to do so: Railroad Co. *v.* Freeman, 36 Ark., 46."

2. In addition to the fact that the compress platforms were unsafe for the storage of cotton, the employees of the compress company did not use the means in their power to prevent its destruction.

The manager of the company had gone to dinner; the bookkeeper, the only other white man on the premises, was in the office asleep and the five employees were near the press eating dinner. A locomotive drawing a heavy train of cars passed along the south side and a switch engine on the west side, and in 20 or

30 minutes the fire was discovered at the southwest corner. After these engines passed no examination was made by any employee to see whether sparks had fallen on the exposed cotton, and it appeared that this duty had not been imposed on any one. When the employees discovered the cotton on fire, they attempted to throw water on it from the hose attached to a hydrant near the southwest corner, but the nozzle belonging to the hose was missing and their efforts were ineffectual After some time the nozzle was found in another part of the premises, but when it was attached to the hose, it was too late to check the fire.

The question whether these acts on the part of the compress company and its employees constituted negligence which contributed to the loss of the cotton should have been left to the jury, since the compress company was the agent of the railway company in custody of the cotton. I believe the authorities clearly sustain the proposition that the railway company is liable for the negligence of the compress company and its employees.

Bank of K'y *v.* Adams Express Co., 93 U. S. 174.

Block *v.* Merchants' Dispatch T. Co. (Tenn.), S. W. 6, p. 881.

Boscowitz *v.* Express Co., 34 Am. Rep., 197; 93 Ill., 523.

Christenson *v.* Express Co., 15 Minn., 270 (Gil., 208).

Transportation Co. *v.* Oil Co., 63 Pa. St., 14.

The opinion in the case of Bank of Kentucky *v.* Adams

Express Co., is remarkable for its strength and clearness, and its argument seems to be unanswerable.

In that case the express company undertook to carry a package of money from New Orleans to Louisville, and the bill of lading provided—

> "That the express company is not to be liable in any manner or to any extent for any loss or damage, or detention of such package or its contents, or any portion thereof, by fire."

While the train to which the car containing the package was attached was passing over a trestle on the line of the Louisville & Nashville Railroad, and while the package was in charge of the messenger of the defendant, the trestle of the railway company gave way during the night. The train, with the express car, was thrown from the track and the car, with others, caught fire from the locomotive and was burned, together with said package of money. There was some evidence that some of the timber of the trestle seemed decayed.

It was contended by the express company that it was guilty of no negligence, and that the exemption in the bill of lading exempted it from liability; that although the railway company may have been guilty of negligence in failing to provide a sound trestle, that the defendant was not responsible because it had no control over the railway company or its employees.

The lower court in this case instructed the jury that the express company was not liable for the negligence of the railway company, for it appeared that the express

company used reasonable diligence in selecting the railway company as a vehicle for carrying out its contract of shipment.

But the Supreme Court of the United States reversed that decision holding that the railway company was the agent of the express company, and that the fire exemption did not excuse the express company for the negligence of the employees of the railway company. The court said:

> "The railroad company in transporting the messenger of the defendant and the express matter in his charge was the agent of somebody; either of the express company or the shippers or consignees of the property; that it was the agent of the defendant is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service of the defendant; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had had they any control over the railroad company or its employees. It is true that the defendant had also no control over the company or its servants, but they were its employers and that service was directly and immediately for them. Control of the conduct of the agency is not in all cases essential to liability for the consequences of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service surely it must be he who gave the employment. These acts became his because done in his service and by his direction. Moreover, a common carrier who undertakes for him constitute another person or corporation the agent

self to perform an entire service has no authority to of his consignor or consignee. He may employ subordinate agency; but it must be subordinate to him, but not to one who employs it or pays it, nor has any right to interfere with it.

"If, then, the Louisville & Nashville Railroad Company was acting for these defendants and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of R. R. Co. *v.* Lockwood? The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable. This is equally true, whether the contract be for exemption from liability for agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically, he has; but, most frequently, when the negligence

of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible, because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor and to the public, that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be.

"For these reasons, we think it is not admissible to construe the exception in the defendants' bill of lading as excusing them from liability for the loss of the package by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed."

In the case of Lancaster Milis *v.* Merchants' Cotton Compress & Storage Co. (Tenn.) 14 S. W., 317, the court held that where a bill of lading was issued for cotton giving the railway company the privilege of compressing it at its own expense for convenience of carriage and exempting it from loss by fire, and it appearing that the cotton was destroyed in the compress while in the hands of the compress company for compression, the compress company was the agent of the railway company, and that the railway company would be liable for the value of the cotton if it was destroyed by the negligence of the compress company, and that the stipulation against loss by fire was valid only in the event that the cotton was not destroyed by negligence of the compress company. The result of that case was that the railway company was held

not liable because of the proof that the compress company was not guilty of negligence.

The principle contended for is ably sustained by the opinion in the case of Block *v.* Merchants Dispatch T. Co. (Tenn.), 6 S. W., 881, both by reasoning and by au-authority and attention is specially directed to that opinion.

But a case which appears to be still more convincing that the plaintiffs in error should be entitled to recover in this suit is that of Cal. Ins. Co. *v.* Union Compress Co., 133 U. S., 397, which has already been commented upon at length.

In that case, where the facts are almost identical, it appears that the court held the negligence of the compress company, in whose care the cotton was placed, in failing to take care of the cotton stored, was the negligence of the railway company which had issued bills of lading for the cotton destroyed, and we rely with confidence upon that authority.

The defendant in the lower court pressed the point set up in the answer that it had no control over the employees of the compress company.

This question seems to be foreclosed by the opinion in the great case of N. Y. C. R. R. Co. *v.* Lockwood, 17 Wallace, 357. Judge Bradley said:

> "But it is contended that though a carrier may not stipulate for its own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he has no *control*."

After presenting the arguments why such contention was not sound, the court further said :

> "It is obvious, therefore, that if a carrier stipulated not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. Now to what avail does the law attach to these essential duties to the employment of the common carrier if they may be waived in respect to its *agents* and servant, especially when the carrier is an artificial being incapable to act except by *agent* and servants?"

The Fire Exemption in Bill of Lading was Void for Duress.

It was proven in this case that the defendant had three forms of bills of lading for shipment of cotton, substantially the same except the name given to them in headings. One was for domestic shipments within the State of Texas, another for shipments from Texas to points outside of the State within the United States, called an interstate bill of lading, and the other for shipments to foreign ports called export bill of lading (R., 10, 33, 35).

Each of these bills of lading exempted the defendant from liability for loss of the cotton by fire. There was no other form of bill of lading provided by the company for the shipment of cotton, and the agent of the company had no authority to change the form or to accept cotton for shipment except on one or the other of these forms.

The testimony of plaintiffs showed also that they had called for the different freight rates each season, and that

the rate charged in this case was the regular and only rate for the shipment of cotton, and that they had never heard of any other.

Their testimony further showed that they had made repeated efforts to induce the agents of the company at different places along their line in Texas to give bills of lading without the fire exemption.

This evidence leaves it clear that no option was given or afforded plaintiffs for the shipment of their cotton except on the terms prescribed by the bill of lading. Here was a plain coercion on the part of the defendant requiring the plaintiffs to accept this form of bill of lading or none at all. There was an effort on the part of the defendant to prove that they had another higher rate by which they would have shipped the cotton without limiting their liability, but it is shown that no shipment had ever been made of cotton in bales by that rate, that no shipper knew anything about it, and that the agents themselves knew nothing of it, and there was no one authorized to issue such a bill of lading except by direct authority first obtained from the general officers at Dallas, Texas.

It was not necessary to go into the question as to whether this rate was reasonable or not because it was not a rate which was offered to the shippers.

In the case of York Mfg. Co., *v.* Ill. Central Ry. Co., 3 Wallace, 107, Mr. Justice Field said:

> "He (the carrier) is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents

which result from human agency although without any fault or neglect on his part, and he cannot, by mere act of his own, avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused."

In the case of Railway Co., *v.* Cravens, 57 Ark., 112, it was distinctly held that:

"A carrier cannot by special contract limit its common-law liability for losses not occasioned by its negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction; and it is immaterial that the shipper knowingly accepted a bill of lading containing such restriction, without demanding a different contract, if he knew that the carrier's agents had no authority to make any other contract with him."

This doctrine was re-affirmed in Railway Co., *v.* Spann, 57 Ark., 127.

In the case of Louisville & N. R. Co. *v.* Gilbert (Tenn)., 12 S. W. 1018, the court, speaking through Caldwell, J., held:

"A railroad company that has made no reduction in its freight in consideration of a stipulation in a bill of lading exempting it from loss by fire; that has furnished its agent with no form for a bill of lading not containing the 'fire clause'; and that has given him no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the common law responsibility attaching to

the company—is liable for goods destroyed by fire, though the company's officers testified that the company had two freight rates—one under the restricted liability, the other without—and that, if the shipper had so requested, permission would have been given to ship under a contract without the 'fire clause' in it.

"Where the railroad ccompany has given its customers no choice as to whether they would ship with or without the 'fire clause,' the acquiescense of the shipping public in the form of the bill of lading containing the 'fire clause' does not establish the reasonableness of the exemption."

The freight agent in that case testified that if he had been informed that the plaintiff refused to ship his cotton under this bill of lading, then he would have instructed the agent of the company to ship it by the regular rates, which would have been done by telegraph, and that the bill of lading in evidence in that case had always been acceptable to the public.

In the opinion just quoted the court thought there could have been no stronger evidence of duress, and the facts are almost identical with the case at bar.

One of the plaintiffs in that case testified that he had been a shipper over the L. & N. Railway Co. many years and that the Merchants' Exchange at Nashville protested against the introduction of the fire clause in defendant's form of bill of lading and gave the company notice of the protest. The court further said:

"What stronger proof could there be that the company did not, was not ready, and did not pretend to

do business except upon the most restricted liability, than that the agent had no authority to make any contract but the one that he did make and was furnished with no other form of bill of lading?"

The case at bar is stronger than the one referred to, because W. A. Arthur, one of the plaintiffs, testified that he had at different times applied to the agents of the defendant company for bills of lading without the fire clause and that he was informed that they would issue no other kind.

In the case of N. Y. Central Ry. *v.* Lockwood, 16 Wallace, 357, the court said:

"It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men may be permitted to make their own agreements and that it is no concern of the public on what terms an individual chooses to have his goods carried.

"Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit of such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing

what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying him from Buffalo to to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is *advertes* to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected."

The above opinion is a bar to any false pretense or scheme adopted by a carrier to coerce shippers into agreeing to limitations of liability.

If the limitation in the case at bar is to be recognized and approved, then the doctrine that a common carrier must accept goods for shipment without limitation of its liability is a dead letter.

It was certainly unnecessary for the plaintiffs in every shipment to demand that the railway company eliminate the fire clause. It is clearly shown that it was useless to make said demand at any time. The testimony of Hovey, the agent of the company, was that he had no

authority to make any change or to make any other contract. The law then certainly would not have required the plaintiffs to do the foolish thing of demanding what they already knew and what the railway company knew it would not have granted.

There are numerous cases which I believe sustain the plaintiffs' contention.

Nashville, C. & St. L. Ry. Co. *v.* Stone & Haslett (Tenn.), 79 S. W., 1031.

Mo., K. & T. Ry. Co. *v.* Carter (Tex.), 29 S. W., 565.

Texas & Pacific Ry. *v.* Avery (Tex.), 46 S. W., 897.

L. & N. R. R. Co. *v.* Gilbert (Tenn.), 12 S. W., 1018.

Gulf, C. & S. F. Ry. Co. *v.* Wilson (Tex.), 26 S. W., 131.

Gulf, C. & S. F. Ry. Co. *v.* Wilbanks (Tex.), 27 S. W., 302.

Ill. Cent. Ry. *v.* Craig (Tenn.), 52 S. W., 164.

Ward *v.* Mo. Pac. Ry. (Mo.), 58 S. W., 28.

In the last case cited it was held that where a consignee of goods shipped from another State sues a carrier for the value of the goods lost in transit, his right to recover their value cannot be limited by the contract of shipment which expressed a consideration of reduced freight rates, since the contract violates the inter-state commerce act, section 2, forbidding special rates.

The bill of lading executed by the defendant purports to have been given "In consideration of the rate of freight herein named, etc."

Inasmuch as the proof tends to show that the freight rate charged was the regular published rate, there was no

consideration for the restricted liability, and therefore it is not valid.

San Antonio, etc., Ry. *v.* Barnet (Tex.), 34 S. W., 139.
Kellerman *v.* K. C., etc. Ry. (Tex.), 34 S. W., 41.

> "It is also settled that where no choice is shown to have been offered the shipper, he in reality was allowed no option or selection as to the kind of contract under which he could ship his goods; nor was he offered any differences in rates. The contract limiting his liability was a mere form, was without consideration, and could not be relied on."
> Duveneck *v.* Mo. Pac. R. R., 57 Mo. App., 550.

Now if the fire had occurred while the cotton was in the hands of a connecting carrier without notice of the imposition there is sufficient reason why the limitation might have been successfully pleaded. But this cotton was destroyed in the hands of the initial carrier, the defendant, which perpetrated the wrong upon the plaintiffs in compelling them to accept this form of bill of lading.

The defendant held itself out to the cotton shipping public as a common carrier from Texarkana to Utica and it is now estopped from making a contrary claim.

Block *v.* Merchants' Dispatch T. Co., 6 S. W., 881.
Texas & Pacific Ry. *v.* Avery (Tex.), 46 S. W., 897.
Gulf, C. & S. F. Ry. *v.* Wilson (Tex.), 26 S. W., 131.
Gulf, C. & S. F. Ry. *v.* Wilbanks (Tex.), 27 S. W., 302.

The freight charged the plaintiffs from Texarkana to St. Louis was 60 cents per hundred pounds and to this they added the regular freight rates from St. Louis to

Utica, a much greater distance, 25 cents per hundred pounds. It developed in the evidence that the defendant expected to ship this cotton by way of the St. Louis, Iron Mountain & Southern Ry. Co., from Texarkana to St. Louis, and although the latter company was to carry the cotton the entire distance the defendant was to receive $1.50 per bale.

The defendant, as shown, refused to allow the plaintiffs to have anything to do with routing the cotton and they might have shipped it by some other connecting line, by way of New Orleans, Galveston, Dallas, Ft. Worth, or other Texas cities.

The defendant contended that it was to ship the cotton only from the compress to the state line and connect with the St. Louis, Iron Mountain & Southern Ry. Co., a distance of a few hundred yards, and that because this was an inter-state shipment it had a right to incorporate any limitations in the bill of lading that it saw fit. But this is not true so long as it held itself out as a common carrier from Texarkana to Utica, and especially since it appears that plaintiffs would not have been given a bill of lading for the shipment of cotton to the end of defendant's own line without incorporating the fire clause.

The learned counsel for defendant in error in the court below relied upon the authority of the cases of Cau *v.* Texas & Pacific Ry. Co., 113 Fed. Rep., 91, and Charnock *v.* Texas & Pacific Ry. Co., 113 Fed. Rep., 92, both of which cases have recently been affirmed by the Supreme Court of the United States.

But the facts in these cases were quite different from

the facts in the case at bar. From the opinions in said cases the court found:

"No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law, and to have been aware that the carrier, if he so desired, *was compelled to take the freight under its common-law liability, without the fire clause.* Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time, filled them and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as a matter of fact the plaintiff's agent *knew of and assented* to the fire clause. Shippers have been held bound by the fire clause in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under such circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew, or must be held to have known, that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier."

In the case at bar it has been shown that the plaintiffs

had frequently demanded that the bill of lading for the shipment of cotton be changed so as to leave out the fire clause, which had been refused, and plaintiffs knew that it would be useless to make the demand as each shipment was made. The agents of the railway company testified that they had no authority to change the form of the bills of lading; that no other form was provided by the general agents and that no change could have been made under any circumstances without first getting the authority from the general freight offices at Dallas.

Thus it appears that no alternative was left to the plaintiffs in error but to accept the form prepared. There was no bona fide option of selection afforded by the defendant to cotton shippers. In other words, the carrier had placed itself in a position that no bill of lading could be issued without making a new rule at its general offices.

So long as we are assured by all the authorities that a common carrier is compelled to accept goods as an insurer, a shipper is certainly not required to go to the headquarters of a railway company to beg for rights which are denied by regular agents.

No information was ever furnished that these acts of the local agents, in following their instructions, would have been reversed by the same power that authorized them, until this case had reached an acute stage in a court of justice.

The Fire Clause in Bill of Lading if Valid Was Not in Force While Cotton Was Detained For Compression.

In the case at bar it will be noticed that the fire clause is in general terms, and we respectfully insist that it ought not to extend to the loss of the cotton while the carriage thereof was suspended by the carrier for compression. The railway company evidently did not consider it was to be released from the loss of the cotton by fire while it was with the compress company, because it had it insured while on the compress platforms, but not while in transit.

Restriction upon the liability of a common carrier in the bill of lading for the carrier's benefit and in language chosen by himself must be narrowly construed.

"Queen of the Pacific," 180 U. S., 52.

T. & P. Ry. Co. *v.* Reiss, 183 U. S., 626.

The bill of lading does not exempt the defendant from loss by fire while the cotton is in charge of the compress company. It does, however, give to the *defendant* the right to compress the cotton, but the compression of the cotton under this clause would be the act of the defendant. It did not authorize the defendant to have the cotton compressed by some person or company as agent for the plaintiffs. The compression of the cotton was to be performed by the defendant, and when it selected the compress company to perform that act that company became the agent or employee of the railway company.

In the case of the Texas & Pacific Ry. Co. *v.* Reiss, 183, U. S., 621, Mr. Justice Peckham defines the rule in regard to construing a bill of lading most strongly against the carrier as follows:

> "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the condition of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in National Bank *v.* Insurance Company, 95 U. S., 673, 679. 'Both reasonable and just that its own words should be construed most strongly against itself.' To the same effect is London Assurance, etc. *v.* Companhia, etc., 167 U. S., 149, 159, and 'Queen of the Pacific,' 180 U. S., 49, 52."

The only exemption in the bill of lading while the cotton was being compressed was that the defendant would not be charged with "deviation or unavoidable delay."

In the case of Deming *v.* Merchants' Cotton Compress & Storage Company (Tenn.), 17 S. W., 91, it appears that:

> "The carriers selected by contract, and by usage

(as to those who had no contract), the compress company as their agent, and agreed to be bound on delivery to it when they executed bills of lading. It was competent for them to do this, and they did it; and while doing so, those who had contracts with the compress company, recognizing it as a special risk before the cotton came actually into their depots or cars, stipulated with their agent, the said compress company, to carry insurance for their indemnity, as they also had the right to do, while those who had no such contract took this special carrier risk without it, as they also had the right to do. But the compresses of the company did not thereby become depots, stations, or places of trans-shipment of the carriers, even of those who had none of their own in Memphis, because they contracted, where such carriers issued bills of lading, with reference to intended shipment over lines which did have, and the same rule applies to them as initial lines, either alone or in association with others."

The Court further said:

"General causes of exemption from loss by fire will be construed to relate alone to loss in depots, stations, on the cars, or in places of trans-shipment of the carrier after actual custody of the cotton, and held inoperative to excuse from liability for this loss. These limitations upon the common-law liability of a common carrier are not favored. They are to be strictly construed, and limited to the general risk of the carrier after actual custody of the cotton, unless the terms thereof expressly extend to a special risk. Where, therefore, a carrier has affected an arrangement with a compress company to act as the carrier's agent, and receive cotton in the agent's press, and

accepts delivery there by the shipper instead of at the carrier's own depot, and upon such delivery issues the ordinary carrier bill of lading, stipulating for exemption from loss by fire, it will not be construed to relate to fire in the cotton compress. Such a clause will not cover a special risk like this."

In the case of Thomas v. Lancaster Mills, 71 Fed. Rep., 485, the Court said, in referring to similar fire exemption in bill of lading:

"The exemption contemplates a continuous carriage according to the usual course of business and the dangers incident to such carriage. It doubtless comprehended such usual delays as attended transportation in the ordinary dispatch of business. It may be doubted if the exemption included dangers incident to suspended transportation at the mere election of the carrier. It certainly did not contemplate that the carrier during such suspension of transportation might negligently expose cotton to danger that ordinary foresight should have guarded against."

Independent Contractor.

It is urged as a defense that the Union Compress Co. was an independent contractor with reference to the compression of this cotton.

The bill of lading provided that—

"Each carrier over whose route the cotton is to be carried hereunder shall have the privilege at its own cost of compressing the same, for the greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression." R., 12.

This provision had for its purpose only to estop the plaintiffs from claiming damages for "deviation or unavoidable delays," which leaves a clear implication that the railway company was to be charged with the custody and safety of the cotton while it was being compressed. A different construction would extend the exemption beyond the terms of the contract.

One who has by contract assumed certain liabilities cannot free himself therefrom by the employment of an independent contractor, and this principle has been held to be applicable when the contract is merely one implied by law.

Am. & Eng. Ency. Law, vol. 16, page 204.

Montgomery Gas Light Co. v. Montgomery, etc., R. C., 86 Ala., 373.

Atlanta, etc., R. Co. v. Kimberly, 87 Ga., 161.

Waller v. Lasher, 37 Ill. App., 609.

Edwards v. N. Y., etc., R'y Co., 98 N. Y. 245.

Where one lets a contract to build a house, the contractor cannot evade its obligations by subletting it.

In this case, if the compress company, while engaged in the compression of cotton under its contract with the railway company, had injured some third party in his person or property who was under no contract with the railway company, his only remedy would have been against the compress company.

Martin v. R'y Co., 55 Ark., 510.

But there is certainly no reason why the plaintiffs, who had a contract with the Texas & Pacific R'y Co., and not

with the compress company, should be required to pursue the compress company for its negligence in performing what the Texas & Pacific R'y Co. had agreed to do.

While there might have been a right of action in behalf of plaintiffs against the compress company, the railway company was primarily liable, and such action could not have been maintained except through the contract with the Texas & Pacific Ry. Co.

Bank of Ky. *v.* Adams Express Co., 93 U. S., 174.

N. J. Navigation Co. *v.* Bank, 6 Howard, 381.

Rules of Texas Railway Commission.

The defendant further contends that under the rules of the Texas Railway Commission and its own rules and regulations that the defendant was not liable for the cotton destroyed by fire while on cotton compress platforms.

This rule of the railway commission provided that:

> "When cotton is tendered to railway companies upon compress platform which is situated on the track of such railway companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk or insurance involved by such act of the railroad company."

Rule 11 of the railway company contains the same provision (R., 90).

The plaintiffs' evidence showed that they had no knowledge of these rules (R., 100).

The evidence of Mr. Ware and Mr. Buron showed that the Texas & Pacific R'y Co. had no depot or station at Texarkana for the reception of cotton, and all cotton in Texarkana was received by the defendant at the platform of the Union Compress Co. The witness Buron testified that he did not know what he would have done as agent of the company if the cotton had been tendered on the merchandise platform, but that he would have had to receive it and would have sent it down to the compress (R., 92).

The rules mentioned were therefore inoperative as to the cotton shipped from Texarkana, even if plaintiffs had known of them, for plaintiffs delivered the cotton at the place designated and provided by the defendant.

Besides, the rules of the railroad and the Texas Railroad Commission were complied with in the provision requiring the shipper or the compress company to assume the additional risk or insurance involved by such railway company in receiving the cotton, as uncontradicted proof shows that the compress company took out and carried insurance to cover loss by fire, payable to the railway company, and the insurance policies were delivered to the company.

Another reason why the rules referred to should not affect this case is that they evidently were not intended to apply to cases where cotton was received on platforms

and there detained by the railway company for its own convenience for compression. The rules should not extend further than necessary to protect the railway company for the time necessary to place it on board cars and remove it. Since the railway company elected to place the cotton in charge of the compress company on its own account for compression, then the shipper should be relieved of the insurance risk from that time.

The cotton was destroyed after the railway company had determined to compress it and was detaining it for that purpose.

But in order to understand the reasons governing the Railway Commission of Texas in adopting this rule, it is necessary to refer to the statutes of Texas, article 319, of the Revised Statutes of 1895, which reads as follows:

> "The duties and liabilities of carriers in this State shall be the same as are prescribed by the common law and the remedies against them shall be the same, except where otherwise provided by this title."

Article 320 prohibits a common carrier within the State of Texas from limiting their common-law responsibility by inserting exceptions in the bill of lading for the shipment of goods, wares, merchandise, etc.

The Texas Railroad Commission, in adopting the rule referred to, had before them this statute requiring common carriers to accept freight without limiting their common-law liability as insurers on shipment within the State of Texas. It was evidently the intention of the commission to relieve the carriers as insurers on local shipments within the State in consideration of the

convenience given to the shippers by accepting cotton on compress platforms.

But interstate shipments cannot be affected either by the statute or the rule, as frequently decided by the Supreme Court of Texas.

Mo. Pac. Ry. *vs.* Sherwood, 84 Texas, 125; 19 S. W., 455.

R'y *v.* Whitehead (Tex.), 26 S. W., 172.

Houston Direct Nav. Co. *v.* Ins. Co. of N. Am. (Tex.), 32 S. W. 889.

The contract between W. A. Arthur & Co. and the defendant was for an interstate shipment.

Wherefore plaintiffs in error pray that the judgment of the Honorable United States Circuit Court of Appeals for the Eighth Circuit be reversed.

JAMES K. JONES,
JAMES K. JONES, JR.,
Attorneys for Plaintiffs in Error.

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IN THE
Supreme Court of the United States

NO. 176,

W. A. ARTHUR & CO., ...Plaintiffs in Error.

vs.

TEXAS & PACIFIC RY. CO., ...Defendant in Error.

ADDITIONAL ARGUMENT FOR PLAINTIFFS IN ERROR.

WILLIAM H. ARNOLD,
Attorney for Plaintiff in Error.

JAMES K. JONES,
JAMES K. JONES, JR.,
Of Counsel.

TEXARKANIAN, TEXARKANA.

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ADDITIONAL ARGUMENT FOR PLAINTIFFS IN ERROR.

The court's attention is respectfully directed to the following summary of the evidence in this case:

Evidence of John C. Ware.

Mr. Ware testified that he took the compress receipts which he had received for the fifty bales of cotton to the agent of the railway company and surrendered them and took the bill of lading, that he knew that this was the only form of bill of lading which the railway company would issue for interstate shipments. (R. 14-15). The bills of lading were dated September 17th, and the fire occurred September 19,

1900. The compress platforms were the only place the railway company had for the reception of cotton for shipment from Texarkana and had been for several years. Rec. 15, 21.

The regular rate on cotton was 60 cents to St. Louis and 25 cents from there to Utica. (R. 15). He knew that the railway company would not strike out the fire clause, as they were the forms that the Railway Company had furnished and he had tried striking out clauses in previous shipments and had asked the privilege of routing the cotton, which were always denied. R. 16.

The shippers in this case had nothing to do with the compression of the cotton. That was a matter of no concern to them and it was purely for the convenience of the railway company. R. 20.

Testimony of W. A. Arthur.

It is shown by the evidence of Mr. Arthur that he had been in the cotton shipping business for many years and that he knew the Texas & Pacific Railway Co. would not issue any form of bill of lading without the fire clause; that he had protested against this clause so often and had been denied the privilege of striking it out, he knew that it would be useless to make the request any further and they had to take the bills of lading with that clause if any at all. R. 27-28.

Testimony of C. P. Hovey.

Mr. Hovey, the agent of the Railway Company,

testified that he was not authorized to issue any other form of bill of lading than that containing the fire clause and that the only freight rate he was authorized to quote to shippers to Utica was the 85 cent rate. R. 30-31.

Testimony of V. E. Buron.

Mr. V. E. Buron, chief clerk at freight depot, testified that the compress was the only place where the Railway Company received cotton for shipments. (R. 37). The Railway Company paid for compressing the cotton. The Compress Company paid the premiums on the insurance policies. Witness went to the Compress every ten days to check up the amount of cotton there for which his company had issued bills of lading and required the increase of the insurance when necessary. Was authorized to issue bills of lading to Utica, N. Y., (R. 39) by virtue of traffic arrangements between the Railway Companies. Had no authority to issue bills of lading without the fire clause and would not have done so unless there had been instructions given from the general offices in Dallas. The published rate to Utica was 85 cents. (R. 40). There was a higher rate but did not remember what it was. (R. 41). If shippers had demanded the bill of lading on the higher rate without the fire clause he had no authority to issue the same. (R. 45). He would have wired for instructions to Dallas. When he went to the compress he saw the character of the buildings and surroundings

of the compress. Railroads on three sides. No sheds over cotton. R. 45.

Testimony of George West.

Mr. Geo. West, the superintendent of the Compress, testified: That he did not compress for any one but the railroads. R. 51.

Owners did not pay for compression. We got 10 cents per hundred for handling and compressing and loading. We carried insurance in behalf of the railroads to cover our liability to them. (R. 51). The platforms were 350 or 400 hundred feet long; the sheds 100 by 200 feet. There were only two fire plugs and these were on the west side, 140 feet apart. The cotton on these platforms had been catching on fire frequently before this fire which destroyed plaintiff's cotton. (R. 53). It was surrounded on three sides by railroads. (R. 54). This compress was more hazardous than the usual run of them. (R. 60). The compress at Little Rock (owned by the company which owned the Texarkana compress) was protected better every way. Had a brick fire wall on the platform close to the only main line of railroad which passed the platform, and the platform was not over 20 feet wide. (R. 61). The Texarkana compress had an open platform all around, from 60 to 100 feet wide, with no covering. (R. 60). The railway agents came down to the platforms from time to time and instructed us about keeping up sufficient insurance and we met their requests when more

insurance was demanded. Buron asked for additional insurance a few days before the fire occurred. R. 60.

On the day the fire occurred there was a high wind and it was a very dry time. There was no watchman kept on the platforms, all the employes were eating dinner at the press. The open platforms were covered with cotton and bagging, and no watchman was there to notice the sparks from passing trains. The nozzle to the hose was disconnected from the hose, in another part of the platforms, and could not be found until it was too late to do any good, and there was not sufficient fire plugs in reach. See the testimony amply sustaining these facts by the following witnesses:

Wagner, R. 45; Baker, R. 62; Gaither, R. 86; Murphy, R. 87.

ARGUMENT.

The court's attention is especially directed to the cases arising out of a fire which destroyed the cotton in the sheds of the Union Compress Co., at Little Rock, Arkansas, November 14, 1887, two of which cases went to the Supreme Court of the United States:

California Ins. Co. v. Union Compress Co., 133 U. S. 387;

St. L. I. M. & S. Ry. Co. v. Commercial Ins. Co., 139 U. S. 223.

One to the Supreme Court of Arkansas:

Martin v. Railway Co., 55 Ark. 510.

And there was a written opinion by Judge Henry C. Caldwell in another of said cases, the principles of which seem unchallenged except as to the question of the proximate cause.

Marine Ins. Co. v. St. L. I. M. & S. Ry., 41 Fed. 643.

If the decision in the case of Cal. Ins. Co. v. Union Compress Co., 133 U. S. 387, is correct, then we respectfully submit that the judgments of the lower court in this case should be reversed.

The facts in that case show that the St. L. I. M. & S. Ry Co. and the Memphis & Little Rock Ry. Co. had issued bills of lading for cotton in the custody of the Union Compress Co. consisting of several thousand bales of cotton awaiting shipment and that bills of

lading had been issued for most of it by said railroads. The cotton was unprotected against loss by fire, there being no covering on the same, and from some unknown cause a fire broke out and destroyed the cotton. The Union Compress Co. had taken out insurance upon the cotton for the benefit of the railway companies to indemnify them against loss by reason of having issued the bills of lading, and these bills of lading contained a stipulation that the railway companies should not be liable for the destruction of the cotton by fire. The suit was filed by the Union Compress Co. upon the insurance policies for the benefit of said railway companies, and in order to recover it was necessary to show that the railway companies were negligent in failing to take care of the cotton after they had issued bills of lading therefor, and there was a recovery on that ground in the lower court, which was sustained by the supreme court. In other words, it appeared that as soon as the bills of lading were issued the railway company then became chargeable with the care of the cotton.

The court in the last paragraph of the opinion said:

"The only question for litigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of destruction of the cotton by fire. Its liability is not dependent up-

on the question whether the liability of the railroads had been discharged, nor is the plaintiff's right of action contingent upon the payment by the railroad companies the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under the circumstances which impose a liability upon the railroad companies."

As the railroad companies had written in the bills of lading the fire clauses exempting them from liability, the only ground on which the insurance company was held responsible for the loss in this case was that these companies had left the cotton exposed and had negligently failed to take proper care of same.

In the case of Marine Insurance Co. v. St. L. I. M. & S. Ry., supra, it was contended that there should be no recovery because the owners of the cotton knew that they were placing the same with a railway company which stored it in an unsafe place, that the place where the railway company accepted the cotton at the compress platforms, was unsafe and the owners were guilty of contributory negligence in delivering the cotton there. But the opinion in that case shows that the claim of contributory negligence could not be sustained, that the delivery of the cotton at the sheds by the owners was in no sense the proximate cause of the loss: "Moreover the defendant gave bills of lading for all cotton that was offered to it for shipment, down to the very day of the fire; and it cannot now be heard to say

that it was the fault of any one to trust it to perform its duty."

See also where the same question was discussed in the case of Railway v. Fire Association, 55 Ark. 177:

"The fact that the cotton in question was placed on a platform where it was exposed to danger did not cause the owner to forfeit the protection of the law. The cotton was placed on a platform constructed near the track of the railroad for the purpose of receiving freight for shipment and where the railroad company had been receiving cotton. The owner had the right to place it there, and in doing so did not lose its right to compensation for its destruction or damage occasioned by the negligence of the appellant."

There was ample evidence in the case at bar to show that these platforms had no adequate fire apparatus and the cotton was kept uncovered in a very dry season and this fact was known to the agents of the Railway Company who went down and inspected from time to time, and as the dangers increased got more insurance.

While the appellants had possession of the cotton, it was within their power to take out insurance, but this right was lost when the Compress Company insured it for the defendant. When it was turned over to the Railway Company, plaintiffs had the right to expect that it would use ordinary care to protect it. The fact that the Railway Company took out insur-

ance shows that it considered that it was liable for the negligent destruction of the cotton.

The case of St. L. I. M. & S. Ry. Co. v. Commercial Ins. Co., 139 U. S. 223, and Railway Company v. Martin, 55 Ark. 177, were suits that were brought against the Railway Company some time after the decision in the case of California Insurance Co. v. Union Compress Co. But these cases arose out of the same fire, and on a different state of facts. The cotton for which these suits were brought had never been turned over to the Railway Company and no bills of lading had been issued therefor. The suits were instituted on the theory that because certain cotton for which bills of lading had been issued, was destroyed by fire, the Railway Company ought to pay for the cotton to which this fire spread, which involved the cotton in suit, but recovery was denied.

There is no principle decided in either of these cases that touches any point in the case at bar.

The Case of Bank of Kentucky v. Adams Express Co. 3 Otto 174 (93 U. S.)

The facts in this case are peculiarly applicable to the case at bar.

It appears that the Adams Express Co. received a package to be carried from New Orleans, La., to Louisville, Ky. The express messenger took charge of the package and deposited it in the express car for transportation to Louisville and while the car was passing

over a trestle on the line of the L. & N. R. R. the trestle gave way and the train with the express car was thrown from the track and the car with its contents caught fire and was burned together with the package. There was some evidence that the timber of the trestle had decayed and it was contended on the part of the shipper that the express company was liable because of the negligence of the railway company, and the United States supreme court sustained this contention, although there was a stipulation in the bill of lading releasing the express company from liability by reason of "dangers of railroad transportation or by fire or steam."

The court said:

"But the circuit court ruled, the exception did not extend to negligence beyond the carriers own and that of the servants and agents appointed by them and under their control; that it extended to losses by fire resulting from the carelessness of a railroad company, employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was, that the Railroad Company and its employes were not under the control of the defendants. With this ruling we are unable to concur. The Railroad Company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody: either of the Express Company or of the shippers or consignees of the property. That

it was the agent of the defendant is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employes; it is true the defendant had no control over the company or its servants but they were its employers; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. More over a **common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee.** He may employ a subordinate agency; **but it must be subordinate to him,** and not to one who neither employs it nor pays it, nor has any right to interfere with it.

The court further said:

"It (in referring to the limitation of liability) exempts the defendants from responsibility for loss by fire, caused by the acts or omissions of all persons who

are not agents or agencies for the transportation.

"That is a large restriction; and beyond that, in our judgment, the exception in the present case does not extend.

"To the opinion we have thus expressed we find direct support in the case of Hooper v. Wells, 27 Cal. 11. There an express Company had undertaken to transport gold-dust and bullion from Los Angeles to San Francisco, and deliver to address. The receipt for the property contained the following stipulation: 'In no event to be liable beyond our route, as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified in this receipt.' In the course of the transportation, the messenger of the carriers who had the property in charge took it on board a steam-tug, for the purpose of placing it on a steamer bound to San Francisco. On the way to the steamer, the boiler of the steam-tug exploded, in consequence of carelssness of its officers, and the gold-dust and bullion were thereby lost. The steam-tug did not belong to the express company; nor was it or its officers under their control. Yet the court adjudged that the managers and employes of the steam-tug were in legal contemplation the managers and employes of the carrier,

and that the restrictive clause in the receipt did not exempt the carriers from liability for loss occasioned by the carelessness of those employes. To the same effect the case of Christenson v. American Express Co., 15 Minn. 270, and the case of Machu v. Railway Co., 2 Exch. 415, though arising under the Carrier Acts. of II Geo. IV. and I Wm. IV., is very analogous. The statute declared that the carrier should be liable to answer for the felonious Acts of any coachman, guard, bookkeeper, porter, or other servant in his employ. The court considered that all parties actually employed in doing the work which the carrier under took to do, either by himself or his servants, were to be regarded as his servants, within the meaning of the act. Baron Rolfe said, the right as against the carriers arises not from the relation of master and servant, but by virtue of the contract into which they have entered to deliver the goods. This was said in answer to an argument like the one relied upon in this case, that the relation of master and servant could not exist between the carriers and the servants of a subcontractor."

In the case of Lancaster Mills v. Merchant's Cotton Press & Storage Co., (Tenn.) 14 S. W. 317, it is shown that where a bill of lading of cotton gave the railroad company the privilege of compressing the cotton at its own expense for the convenience of carriage and exempting it from loss by fire, the railway

company would be liable for loss of cotton by fire if caused by negligence, while it was stored in the warehouse for compression.

In the case at bar it is shown that the defendant in error had no place in Texarkana for the reception of cotton for shipment except at the compress platforms, and in this case when the cotton was received there, defendant ordered its compression and detained it at the platforms, which the uncontradicted proof shows was unguarded and unprotected against fire and we contend that it was an act of negligence on the part of the railway company to keep said cotton there for any length of time, and that by so doing it assumed the risk incident thereto, which was evidently understood and recognized by the railway company, as it demanded and received from the Compress Company insurance upon the cotton, which was paid for by the Compress Company, and after the insurance was effected it was immaterial to the Railway Company what the risks were. It appears that the insurance was to cease after the cotton left the platform. This insurance must have been effected for some purpose. The policies read that they covered the legal liability of the Railway Company. If the contention of the Railway Company in this case is correct that it was not responsible for the cotton while it was on the compress platforms, it cannot be perceived why it required the Compress Company to take out the insurance. These facts bring

the case at bar within the lines of California Ins. Co. v. Union Compress Co., supra.

There was also unquestioned negligence on the part of the employes of the Union Compress Co. in failing to guard or watch the cotton while it was on the platforms or take notice of the sparks flying from the passing locomotives which had frequently caused the cotton to catch before, and from which source the cotton evidently caught at this time; and under authority of the decision of the Bank of Kentucky v. Adams Express Co., supra, that the negligence of the Compress Company, which was acting as agent for said company, under this contract in suit, was imputable to said Railway Company.

The language of the contract between the plaintiff and defendant is that "Each carrier over whose route the cotton is to be carried herein shall have the privilege at its own cost of compressing the same, etc." (R. 12). It was clearly intended by this language that the compression of the cotton, if done at all, should be the act of the carrier, and no permission was given to employ a compress company to act as the **agent** for the **shipper**, and there is no implication that the shipper was to look to a compress company for damages in case there should be a negligent loss of the cotton.

On the authority of the Bank of Kentucky v. Adams Express Co. we feel sure that the primary lia-

bility rests upon the carrier by reason of the contract, and that it was not within the meaning of the contract that the responsibility for negligence in the loss of the cotton might be averted by the Railway Company by subletting the performance of a part of said contract to a third party; and in procuring such agency in carrying out said contract, the Railway Company could not avoid its liability under the contract. Certainly it will not be contended that where one obligates himself to perform certain service, he can evade the responsibility by employing some one else to act in his place. In writing that opinion, the Honorable Circuit Court of Appeals overlooked the fact that the plaintiff was claiming through a contract whereby the compression of the cotton was to be done by the **carrier** and there was no exemption of liability under this provision of the contract except for "deviation and delay," which are not the grounds in this suit.

On this question we quote the following extract from the opinion of the court in the case of Bank of Kentucky v. Adams Express Co.:

"Now, can it be a reasonable construction to give to the contract between the defendants and the plaintiffs, that the former, who had agreed to carry and deliver the packages at Louisville, reserved to themselves the right to employ a subordinate carrier, arrange with him that he should be responsible only for ordinary vigilance against fire, and by that arrange-

ment relieve themselves from what without it would have been their clear duty. Granting that the plaintiffs can sue the Railroad Company for the loss of the packages through its fault, their right comes through their contract between it and the defendants. They must claim through that. (N. J. S. Nav. Co. v. Bk., 6 How., 381). Had the packages been delivered to the charge of the Railroad Company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the Express Company and to the plaintiffs. But as they were not so delivered, the right of the plaintiffs to the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the Railroad Company, notwithstanding the exception in their bills of lading."

The court should have submitted to the jury the question whether the platforms of the Union Compress Co. were held out to the general public by the defendant as the only place in Texarkana at which it would receive cotton for shipment; and said place and no other was used by the defendant as its depot for cotton shipments, that it was known to the agents of the Railway Company that said platforms were unsafe for the storage of cotton, because there was no proper apparatus for extinguishing fires and no shed, covering or watchman provided for the protection of said cotton against fires, and that keeping said cottton in such un-

safe place, after it had been delivered to the defendant for shipment was negligence which caused the destruction of said cotton. There were not sheds, covering, fire apparatus or watchman to protect the cotton. R. 53, 54, 60 and 61.

We submit that on the evidence introduced as to the condition of the platforms and the unprotected condition of the cotton, with no fire apparatus, and the trains passing on three sides of the platforms constantly where the cotton was exposed in a dry season, made a question which should have been submitted to the jury as to whether there was negligence on the part of the Railway Company in constituting this as its receiving station for cotton and in keeping it there for its own convenience for compression.

The circumstances under which a court may direct a verdict for the defendant was discussed in the case of Marande v. Texas & Pacific Ry Co., 184 U. S. 173, which was a suit for the destruction of cotton by fire which was not guarded or taken care of by the defendant and it was held that:

1. That the obvious danger resulting from the use of locomotives about so easily ignitable a material as cotton was clear, and the jury would have been reasonably justified in drawing the inference that it had caused the fire;

2. That the proof showed negligence in the care of the property;

3. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus, and from the want of instructions as to its use, or competent men to handle it."

And on page 192 the court, Mr. Justice White, said:

"That the storage of such a great mass of cotton in the open sheds and on the wharf, with only a few narrow gangways from front to rear, with no passage-ways between the tiers running lengthwise of the sheds, so as to enable the cotton to be inspected and to be accessible upon an alarm of fire, with substantially no tarpaulins or other covering, and the operation of the locomotives in and around the open sheds and in front of the wharf among the cotton so situated, at least afforded sufficient proof to go to the jury, we think is too clear for discussion."

The uncontradicted proof is that the Compress Company was acting under the direction of the Railway Company in holding said cotton for compression under and by virtue of the authority given to said defendant by section 5 of the bill of lading, which provides that:

"Each carrier over whose route the cotton is to be carried hereunder shall have the privilege at its own cost of compressing the same for greater convenience in handling and forwarding and shall not be respon-

sible for **deviation or unavoidable delays** in procuring said compression." R. 12.

The plaintiffs had received from the Compress Company compress tickets for their cotton and when they got ready to ship they took the compress receipts to the Railway Company and turned them over and received a bill of lading for the shipment of said cotton to Utica, N. Y. Thereupon the Railway Company surrendered to the Compress Company said tickets, took a receipt for the cotton for the account of the Railway Company, directed the Compress Company to compress said cotton and to load the same on cars. The Compress Company took out insurance in favor of the Railway Company and then said cotton was blocked out from other cotton, carried to the press (R. 94) and would have been compressed if the fire had not intervened.

After surrendering the tickets the plaintiffs had no further claim upon the Compress Company and it ceased to be their agent; and when the Railway Company began to carry out the provisions of the bill of lading by undertaking the compression of the cotton, the Compress Company became the agent of the Railway Company, and the negligent loss of the cotton is imputable to said defendant; the defendant is estopped from claiming that the bill of lading was not in force, because it was acting thereunder in directing the compression of the cotton.

The platforms of the Compress Company were full of cotton. Railroads ran on three sides of it and there were no sheds except a small one in the center, and the platforms covered with cotton were exposed and uncovered from 60 to 100 feet in width all around. Locomotives were constantly passing on all sides. There was no fire apparatus or watchman and these facts were undoubtedly known by the agents of the Railway Company. We submit that the court ought to have left the question to the jury whether or not the Railway Company was not negligent in keeping this cotton there, and also the question whether the Compress Company was not negligent while acting for and instead of the Railway Company under said bill of lading, which negligence caused the destruction of the cotton.

The Honorable Circuit Court of Appeals erred in finding that the bill of lading in this case was not to be an executed and complete contract of shipment until the cotton was loaded on board the cars, because the proof shows that there was nothing further to be done by the shipper, and that the duties of the railway company had begun and said railway company had actually begun to act under the powers and authorities of said bill of lading in proceeding to have the cotton compressed; there is no proof whatever that there was any understanding between the agent of the railway company and the shipper that the bill of lading was

not to become effective until after the cotton had been loaded on the cars.

The Court of Appeals also erred in its conclusions that there is a usage in the southwest and at Texarkana that where railroad companies issue bills of lading for cotton on compress platforms it is not intended that the liability of the carrier will atttach until the cotton is actually delivered upon its cars. And this court further erred in assuming that in such cases there is a usage that the cotton is still considered to be in the hands of the shipper through the compress company for the purpose of being compressed, and that this course is pursued as a matter of convenience by the compress company and the shipper. There is no proof whatever of such usage or custom and no such usage or custom prevails and there is no ground on which it can be found to exist as a matter of law. There is no reference made to an alleged usage of this kind, as will be shown by the record of the trial, except in the **answer which defendant made no effort to sustain by proof.**

And in this case the bill of lading gave the defendant the right to have plaintiffs' cotton compressed for the convenience of the defendant in handling it; and it was optional with the railway company to compress or not; the act of compression in the event said option was exercised was the act of the defendant under the power given in the bill of lading, whether done by the

railway company or its employes, and it was shown that the railway company in the exercise of its right to compress and load it, agreed to pay therefor at the rate of 10 cents per hundred pounds and under that employment the cotton was blocked out and carried to the press and would have been compressed the next day if it had not been destroyed by reason of the dangerous conditions shown in the evidence.

The Court of Appeals erred in finding that the defendant had a depot station in Texarkana on the Texas side (other than the compress platforms) where plaintiffs' cotton would have been received for shipment, when the proof is uncontradicted that it did not have and it was not contended by the defendant that it had a depot; the railway company received all of its cotton for shipment on the platforms of the compress company, which is located on the line of the railway in Texarkana, Texas. The court also erred in finding that the compress platforms were located in Texarkana, Arkansas, when the uncontradicted proof is that said compress platforms are in Texarkana, Texas.

There was also error in holding that the defendant was not liable for the loss of plaintiff's cotton on account of rule 13 of the Texas Railroad Commission, which provides that:

"When cotton is tendered to railroad companies upon compress platforms which is situated on the track of said railroad companies it shall be the duty of the railroad companies to take charge of and receipt

for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when done at its own depot or platforms erected for such transactions, provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by the act of the railroad company."

But it is clearly shown in this case that the defendant had no depot or platform **erected for such transactions**, in fact had adopted the platforms of the Union Compress Co. as its depot or place for the reception of cotton and plaintiffs' had no option to carry it elsewhere for delivery; and the proof shows that the compress company in this case **had assumed the additional risk of insurance** involved by the act of said company by taking out and paying for insurance upon cotton payable to said railway company, while it remained on their platforms and literally complied with the conditions prescribed by the railroad commission.

There was error in the application of the decision of the Missouri Pacific Ry. Co. v. McFadden, 154 U. S. 155, to this case, because the demurrer to the answer in that case admitted as true the allegations of the answer that it was understood that the liability of the common carrier was not to attach until said cotton was loaded; also in applying the case of Edward & Co. v. Texas Midland Ry. Co. (Tex. Civ. Apps.), 81 S. W. 800, because in that case the facts are not only dissimilar, but the contract of shipment had not been completed. In that case it was the duty of the shipper to give the

shipping directions to the compress company, while in this it was made the duty of the railway company to give and it did give the shipping directions.

Limitation in Bill of Lading Against Loss by Fire Void

The testimony of Arthur and Ware Shows that they had often demanded of the Texas & Pacific Ry. Co. the right to ship their cotton without the fire clause and this right had always been refused. (R. 16, 27 and 28). And further that the rate of 85 cents to Utica, N. Y., per hundred pounds for cotton was the only published freight rate which was furnished shippers. (R. 15). The railway agent himself testified that he was not authorized to quote any other rate for cotton except the 85 cent rate and had no authority to issue any other form of bill of lading. (R. 30-31). The chief clerk testified that if a demand had been made on him to issue a bill of lading without limitation at the higher freight rate he had no authority to issue it without instructions from Dallas, Texas. R. 40.

Now it is clear that Arthur & Co. were acting as reasonably prudent men in not continuing to make demands in every case of shipment when they had been so plainly told on different occasions that this was the only rate and the only form of bill of lading, and the testimony of the agent and his chief clerk show that

they had no authority to issue and would not have issued any other form of bill of lading at any other rate without special instructions from Dallas. In other words, it was the object of the Railway Company to place it beyond the power of the ordinary shipper to get what the law declares he is entitled to. Certainly there was enough evidence to submit the question to the jury as to whether this bill of lading, as all others had been, was not imposed upon the denfendants under "duress of circumstances," which would not be binding as shown in the case of N. Y. Cent. Ry., Co., v. Lockwood, 17 Wallace 357. There was here no "real freedom of choice and no reasonable and practicable alternative" which is necessary, as shown by the case last above quoted from, in order to make the limitation binding.

In our opinion the case of Railway v. Cravens, 57 Ark. 112, contains a correct statement of the law that where a railway agent has no authority to issue a bill of lading on another form at another rate the limitation is not binding.

It was contended in the lower court that because the Texas & Pacific Railway Co. had no line of railway running from Texarkana to Utica the shipper had no right to require the Company to issue a bill of lading on its common law liability.

The defendants took another position inconsistent with that, wherein it attempted to prove that there was a higher rate on which a bill of lading would have been issued with restrictions. R. 82.

But it is shown by the testimony of the agent that he had the right under the traffic arrangements with this road and others to issue a through bill of lading, and that seems not to be questioned by any testimony in the case. R. 39.

It is also shown that tariff sheets furnished to the shippers quoted the through rate and the defendant held itself out as a common carrier who would issue through bills of lading to Utica.

The following authorities show that:

"Where a common carrier holds itself out as transporting such goods as plaintiff offered it for shipment, and to the points to which he desired to ship them, it is liable to him for not receiving and shipping them, though those points were beyond its own line."

Chicago, St. L. & P. R. Co. v. Wolcott, 39 N. E. 451; 141 Ind. 267.

"Doubtless a common carrier may so hold himself out to the public as to make himself liable for not receiving and conveying goods beyond his own line."

R. R. Co. v. Morton, 61 Ind. 577.

C. N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184-197.

For the further arguments of this question see the original brief filed in this case.

The Plaintiff in Error respectfully prays that the judgments of the lower court be reversed and that this cause be remanded.

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Jan. 10, 1907.

JAMES K. JONES,

JAMES K. JONES, JR.,

Of Counsel.